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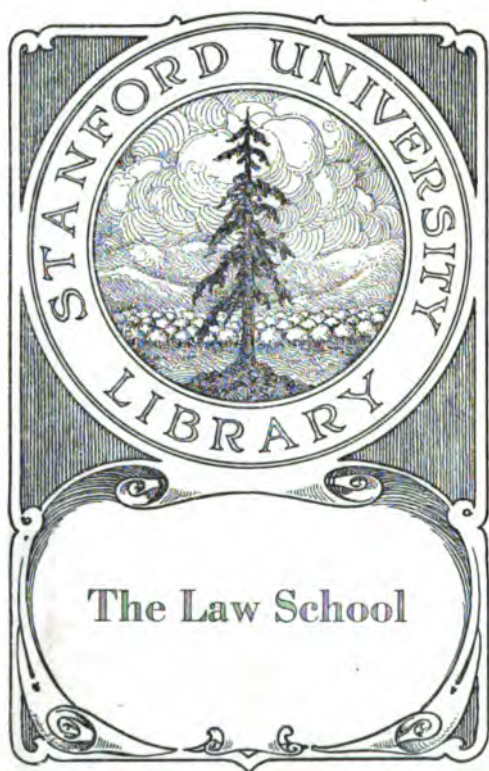
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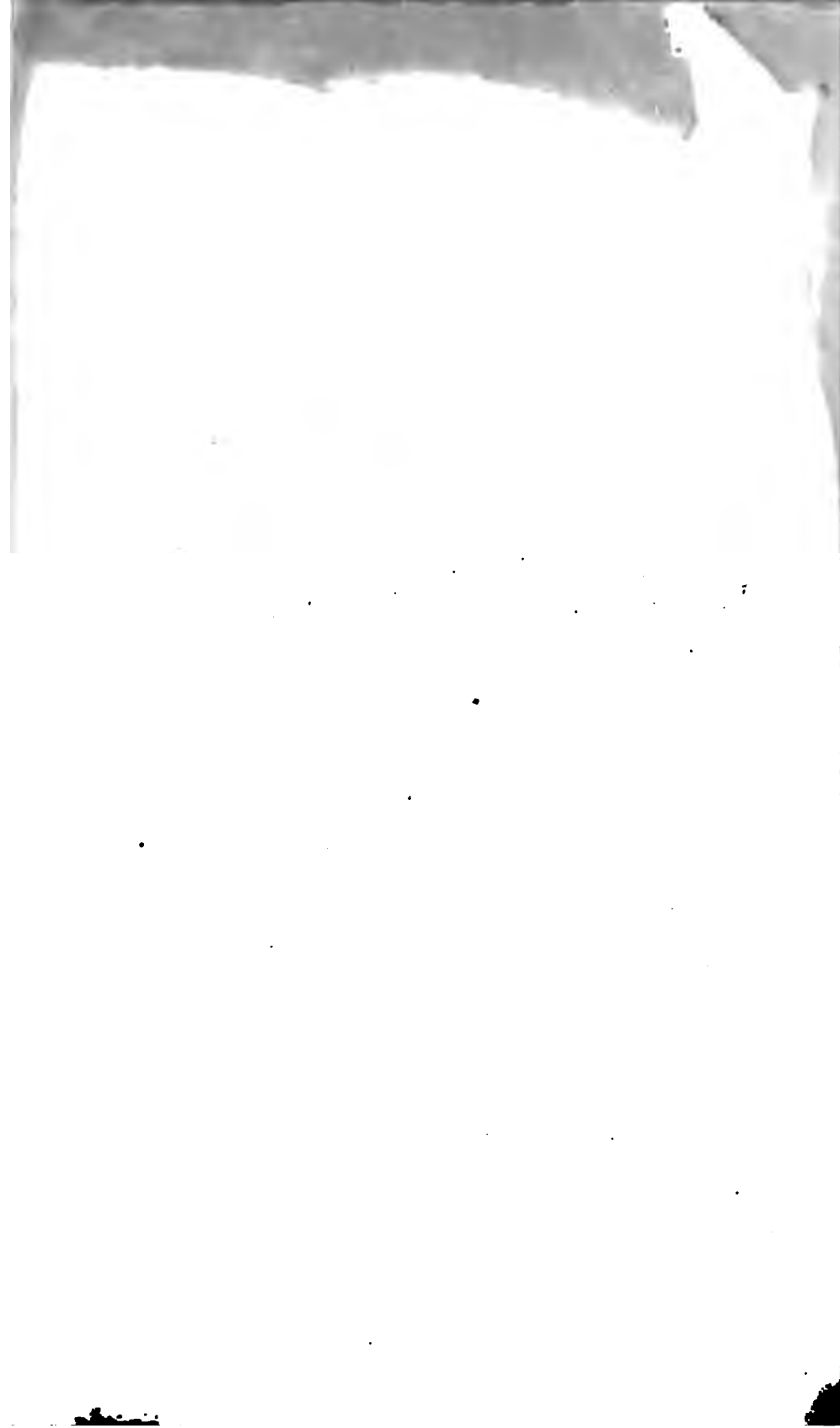
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H. L. GILLASPIE.









REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

Sillars

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

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CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

HILARY TERM AND VACATION, EASTER TERM, AND TRINITY
TERM AND VACATION, 1845;

WITH TABLES OF THE NAMES OF CASES ARGUED, AND OF
THE PRINCIPAL MATTERS.

BY

JAMES MANNING,

SERJEANT AT LAW;

T. C. GRANGER,

OF THE INNER TEMPLE, ESQ.

BARRISTER AT LAW:

AND JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. I.

PHILADELPHIA:

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1872.

JUDGES
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir NICOLAS CONYNTHAM TINDAL,
Knt., Ld. Ch. J.

The Hon. Sir THOMAS COLTMAN, Knt.

The Hon. Sir WILLIAM HENRY MAULE, Knt.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

ATTORNEY-GENERAL.

Sir W. W. FOLLETT, Knt.

SOLICITOR-GENERAL.

Sir FREDERICK THESIGER, Knt.

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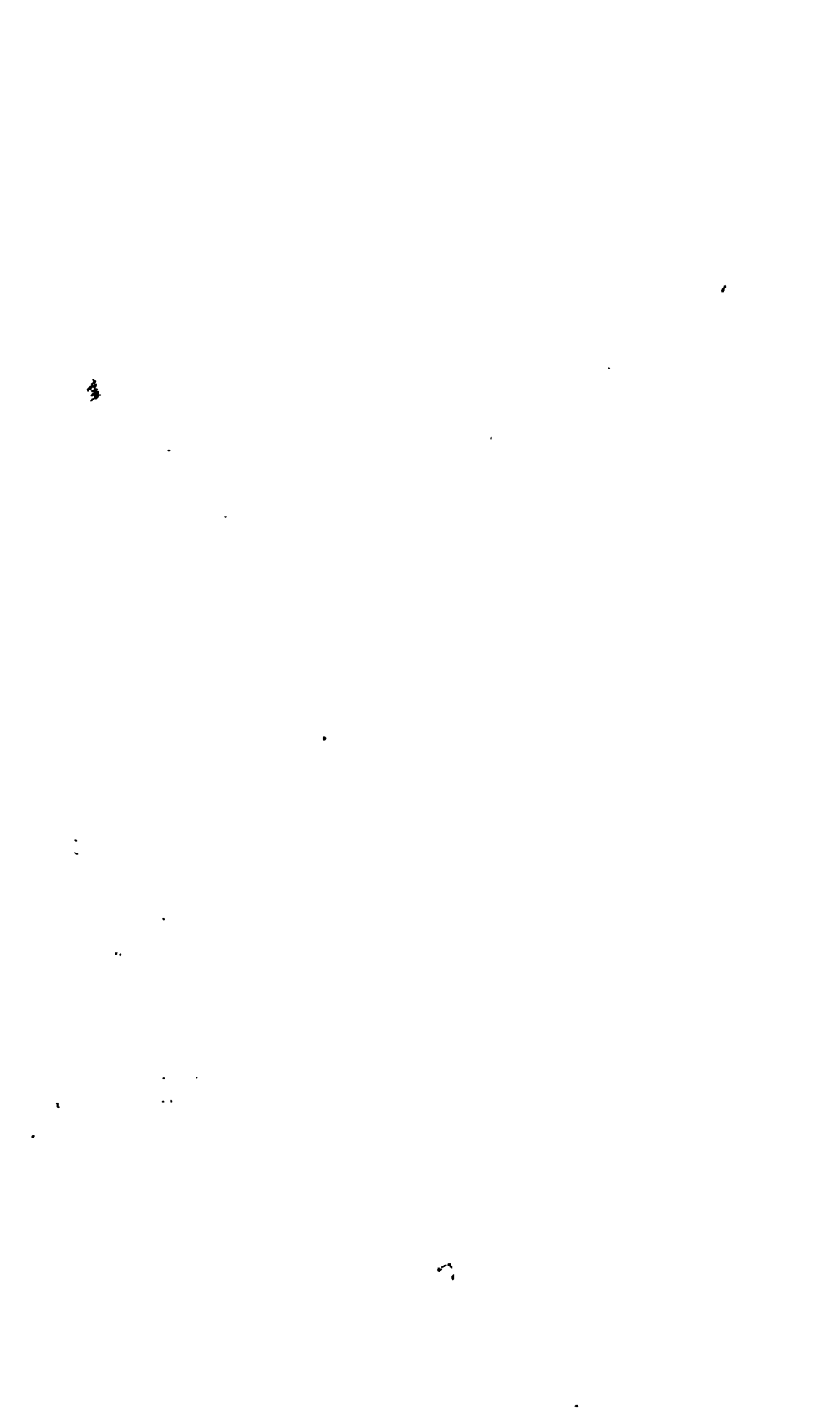
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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
UPON WRITS OF ERROR FROM THAT COURT
TO THE
EXCHEQUER CHAMBER,
IN
Hilary Term,

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

Gillaspie

The judges who usually sat in banco in this term, were,

TINDAL, C. J.
 MAULE, J.

CRESSWELL, J.
 ERLE, J.

GIBB v. KING, a Prisoner. Jan. 13.

The endorsement of a judge is a sufficient authority for the issuing of a writ of habeas corpus ad satisfaciendum, in order to bring up a prisoner to charge him in execution.

The 85th rule of H. 2 W. 4, which requires a prisoner to be charged in execution within two terms after trial or judgment, does not apply to the case of a prisoner in criminal custody. This court has no power to issue a writ of habeas corpus ad satisfaciendum, to charge in execution a prisoner in custody under a conviction for a misdemeanor.

On the 9th of December, 1843, final judgment was signed against the defendant in this cause, for 60*l.* 4*s.* On the 6th of February, 1844, the defendant was convicted of a misdemeanor, and sentenced to be *imprisoned for eighteen calendar months in the Queen's prison: and on the 10th he was committed to the custody of the keeper of that prison. Upon the 22d of November, 1844, the plaintiff sued out, and left with the keeper of the said prison, a writ of habeas corpus ad satisfaciendum, tested in the name of Sir N. C. Tindal, commanding him that he should have the defendant before "our justices at Westminster," on the 25th, to satisfy the judgment. The prisoner was accordingly brought up on that day, to be charged in execution; when it was objected, on his part,

that the writ was irregular; first, because more than two terms had elapsed since the final judgment was signed; secondly, because the writ had issued without the leave of the court or a judge. It was also contended, that this court had no jurisdiction, to remove the prisoner from criminal custody, for the purpose of his being charged in execution in a civil suit. The court adjourned the consideration of the matter until the present term, with liberty to the defendant to draw up a rule calling on the plaintiff to show cause why the writ should not be set aside for irregularity. Against this rule,

Channell, Serjt., now showed cause. The rule of court of H. 2 W. 4, r. 85, which requires, that "the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment," applies only to cases where the defendant is in custody at the suit of the particular plaintiff; *Hall v. Wetherell*, 2 Scott, N. R. 196. [MAULE, J. The plaintiff may not know that the defendant is in custody, if he is not detained at his suit.] With
 *3] respect to the objection that this writ issued "without the leave of the court or a judge, that is sufficiently answered by the fact that it bears the endorsement of one of the judges; and that is the only mode in which authority for issuing the writ is given. The more important question, however, is, whether or not the statute 5 & 6 Vict. c. 22, for the regulation of the Queen's prison, has effected any alteration in the practice on this subject. In *Walsh v. Davies*, 2 New Rep. 245, it was held, that this court had no jurisdiction to bring up a defendant out of a criminal custody, for the purpose of charging him in execution: and the like was held in the subsequent case of *Freeman v. Weston*, 1 Bingh. 221, 8 J. B. Moore, 81; where DALLAS, C. J., in delivering the judgment of the court, says: "It appears that this defendant, after being surrendered before Mr. Justice PARK, in discharge of his bail, was removed, first, to the King's Bench prison, and afterwards to Clerkenwell prison, and sentenced to an imprisonment for crime; which imprisonment is still continuing. Now, in order to charge a man in execution, the custody must be changed to the prison of this court. Could the plaintiff do this without the assistance of this court? Certainly not. The court itself has no such power; for, it was settled in *Walsh v. Davies*, where all the authorities were weighed and considered, that, where a defendant is in criminal execution, this court cannot charge the defendant in a civil action; for, it cannot change the custody, and then commit the defendant again upon the criminal matter. It is true that was only the case of charging him with a declaration; but a defendant is equally entitled to a discharge if not charged with a declaration in due time, as he is if not charged in execution in due time; and, if not entitled to be discharged in the one
 *4] case, he cannot be in the other. What the court of King's Bench, —as the first court of criminal jurisdiction in the kingdom—has

done or may do, in cases of this kind, cannot apply here ; for, in such cases, the habeas corpus is taken out on the crown side of that court ; and it has been long decided that it could only be taken out on the crown side." In *Jones v. Danvers*, 5 M. & W. 234, 7 Dowl. P. C. 394, *Bayley* moved, in the court of Exchequer, for a habeas corpus to bring up the defendant for the purpose of charging him in execution. His affidavit stated that the defendant was under military arrest at Woolwich, under circumstances which might, or might not, lead to a court-martial. He urged that, as the party was not in criminal custody, the writ ought to issue. But the court said : " We cannot bring up the defendant to be charged in execution, unless he is in the custody of a civil jail-keeper. We have only civil jurisdiction, and have no authority to change the custody in such a case as this." Since the passing of the 5 & 6 Vict. c. 22, the Queen's prison being the jail of this as well as of the other courts, the difficulty suggested in these cases no longer exists. [MAULE, J. The question is, whether the writ should not have issued from the crown side of the court of Queen's Bench, as suggested in *Freeman v. Weston*. If this had been a suit in that court, a writ of habeas corpus issued on the civil side would clearly have been irregular.] The court of Queen's Bench has no power to issue process returnable in this court.

Byles, Serjt., in support of the rule. A writ of habeas corpus ad satisfaciendum, issued by a court having no criminal jurisdiction, in order to charge a defendant in execution in a civil action, is clearly irregular. This court is in precisely the same situation, in respect of *jurisdiction, at the present moment, as the court of Queen's Bench was in [*5 before the passing of the 5 & 6 Vict. c. 22. *Walsh v. Davies* is a distinct authority on the subject. There, *Bayley*, Serjt., moved for a habeas corpus to bring up the defendant, a prisoner in Cold Bath Fields prison for a conspiracy, in order to charge him with a declaration ; but the court refused to grant the rule : and CHAMBER, J., said : " This cannot be done without changing the custody of the defendant ; for, the party to be charged must either be in custody of the sheriff or of the officer of this court. In the case of *Peter Vergen's bail*, 2 Stra. 1217, the court of King's Bench directed a prisoner convicted of felony, to be brought up, that the bail might surrender him to the marshal ; after which, the court remanded him to Newgate : and in *Fowler v. Dunn*, 4 Burr. 2034, the court of King's Bench made a similar order ; but the master reported that the habeas corpus must be on the crown side. Upon the same principle, in the case of *John Taylor*, 3 East, 232, where a prisoner in the custody of the keeper of Newgate, under a warrant of commissioners of bankrupt, was brought up by habeas corpus, the court determined, that, being in custody on criminal process, the habeas corpus ought to be on the crown side. If that be so, this court cannot charge the defendant in a civil action ; for, if upon the return of the habeas corpus we should find the custody to be lawful, we must send the defendant back again. Thus

court cannot change the custody, and then commit the defendant again upon the criminal matter." The language of DALLAS, C. J., in *Freeman v. Weston*, is also conclusively in point: and the text books (a) lay it down, as an undoubted rule of practice, that, where the defendant is in criminal *6] custody, this court has no process by which *they can reach him; and that, even in the court of Queen's Bench, a writ of habeas corpus must be taken out on the crown side, in order to enable the civil side to deal with the matter. It may be doubtful even whether a habeas corpus ad satisfaciendum issued on the crown side of the Queen's Bench would avail in a case like this. Probably the proper course would be, to sue out a habeas corpus ad subjiciendum, and then the court of Queen's Bench might direct the prisoner to be brought here by habeas corpus ad satisfaciendum. But, supposing there is no course by which the plaintiff could bring up the defendant to charge him in execution, that will make no difference: he may wait the expiration of the defendant's term of imprisonment, or he may sue out a ca. sa., and lodge it with the keeper of the Queen's prison.

MAULE, J.(b) In this case the defendant has been brought up to be charged in execution at the suit of the plaintiff, upon a writ of habeas corpus ad satisfaciendum, issued out of this court. Since the 5 & 6 Vict. c. 22, a person in the Queen's prison is in the custody of the same officer in whose custody he would have been, if, being at large, he had been taken under a ca. sa. The case, therefore, stands clear of the objection that this is an attempt to change the custody. But the question is, whether the defendant being a prisoner under sentence of the court of Queen's Bench for a misdemeanor, he can properly be brought here under a writ of habeas corpus sued out of this court. Three several objections have been urged to the proceedings. Two of them, viz. that the writ issued without the leave of the court or a judge, and *7] that it was not issued in due time, have been already disposed *of.

For, as to the first, it seems that the writ *was* sanctioned by the endorsement of a judge, in the usual way; and as to the second, inasmuch as the custody was not one of which the plaintiff was bound to take notice, the case is not within the eighty-fifth rule of H. 2 W. 4. This brings us to the main question, which is, whether or not this court has jurisdiction to issue such a writ. It seems to be well established, that, before the passing of the late statute, altering the constitution of the prisons of the several courts at Westminster, the course pursued in the court of Queen's Bench, to charge in execution a prisoner in criminal custody, was to bring him up by a writ of habeas corpus issuing from the crown side of that court: and there is nothing whatever in that act, to alter the practice of the court of Queen's Bench in that respect. It

(a) See Tidd's Practice, 9th edit. p. 345, Archb. Pr. 7th edit. p. 855.

(b) Tindal, C. J., was absent, being engaged with the Lord Chancellor on the discussion of the claim of the King of Hanover to certain of the crown jewels.

would be a very strange thing to hold that this court has larger powers in cases of this sort than the civil side of the Queen's Bench has or ever had. On this ground, therefore, I think the writ has improvidently issued, and that the rule for setting it aside must be made absolute.

CRESSWELL, J. I am quite of the same opinion.

ERLE, J. I am also of opinion that the rule for setting aside the writ of habeas corpus in this case must be made absolute: and I found my opinion entirely upon the practice of the court of Queen's Bench before the passing of the 5 & 6 Vict. c. 22. If, before that statute, it was irregular to sue out a habeas corpus on the civil side of the court of Queen's Bench, under circumstances like those of the present case, it must clearly be irregular, since the statute, to issue such writ out of this court under the same circumstances. Rule absolute.

*GILLING v. DUGAN. Jan. 13.

[*8

The defendant bought goods of A. at Southampton, which were sent to him at Southsea, in Hampshire. Two months afterwards the plaintiff (for whom, it appeared, A., as agent, had made the contract) sent the defendant a duplicate invoice enclosed in a letter posted in Middlesex. In reply the defendant disclaimed all knowledge of the plaintiff, but admitted the contract with A., and expressed his willingness to pay the plaintiff, provided A. authorized him so to do. *Held*, that these letters, A.'s agency being proved, were sufficient to satisfy the plaintiff's undertaking to give material evidence in Middlesex.

DEBT, for goods sold and delivered. Plea, never indebted: whereupon issue was joined.

The venue which had originally been laid in Middlesex, was changed to Hampshire upon the usual affidavit,^(a) but was restored to Middlesex on the plaintiff's undertaking to give material evidence in that county.

The cause was tried before CRESSWELL, J., at the first sitting at Westminster in Trinity term last. The facts that appeared in evidence were as follows:—In October, 1842, the defendant, a tradesman at Southsea, in Hampshire, bought of one Kerrison, who carried on the business of a lead and colour merchant at Southampton, the goods for the price of which this action was brought, and which were forwarded to the defendant from Southampton, together with an invoice in the name of Kerrison, dated at that place. At this time Kerrison *was acting as the agent of the plaintiff*, a lead and colour merchant at Limehouse, in Middlesex, on whose account the goods were sold. Shortly afterwards, the defendant received from one Johnson, who had succeeded Gilling, the plaintiff, in the business at Limehouse, the following letter:—

“Limehouse, December 31st, 1842.

“Sir,—I was given to understand all accounts due to the late firm of H. S. Gilling had been sent in. It would appear from your letter, for-

(a) *Vide post*, 12, n.

warded me from Southampton, that you are not in possession of such.
 *9] *Lest it should have miscarried, or been otherwise lost, I annex you duplicate of particulars. Mr. Gilling having fully declined carrying on the business of lead and colour merchant since the 1st November last, accounts for some little irregularity, and which I trust you will excuse.

"I beg leave to inform you that I have purchased all the remaining stock of Mr. Gilling, and am at same time empowered solely to collect in all his outstanding debts. You will please, therefore, not pay the amount of your account to any one but myself. As above, I hand you my address, where all future applications are to be made," &c.

To this letter, *which was posted in Middlesex*, the defendant replied as follows:—

"Southsea, Jan. 5th, 1843.

"Sir,—In answer to yours the 1st, I beg to say I do not know Mr. Gilling or you, and that I have no account with him or you; and that, if the individual mentioned in your letter, Mr. Gilling, will complete the order I gave him, or will tell me where to send the goods he has forwarded, being part of the order given, I shall feel obliged. If he do complete the order, I will take to the goods, and give him a bill at three months, in March next."

Another letter (which was not produced) demanding a settlement of the account on behalf of Gilling, was sent by Johnson on the 12th of May; to which the defendant replied as follows:—

"Southsea, May 16th, 1843.

"Sir,—In answer to yours of the 12th instant, I beg to say again that I have no account with you or Mr. Gilling, as my letters will prove. But, as you wished me to write to Mr. Kerrison, of whom I bought
 *10] *the goods, I did so, but received no answer, although I knew he was in Southampton. If you will, you may write to him; and, if he will agree that I shall pay you the money due to him from me, you can have the same in a bill, which, if he please, may be drawn by you, he giving me receipt for the same."

On the 27th of May, the defendant again addressed Johnson, as follows:

"Southsea, May 27th, 1843.

"Sir,—I must plainly tell you again, I have no account with Mr. Gilling or you; my account is with Kerrison, as can be proved by his own letters to me, which are as follows:—the first, from Salisbury, being dated September 24th, 1842, soliciting an order from me, signed W. Kerrison. Another, from Arundel Street, Strand, London, October 14th, 1842, closing the same by saying, 'waiting your further orders, I remain yours, W. Kerrison.' My account with Mr. Kerrison is under 40*l.*; and if he will give me an order to pay the same to you in a bill at three months, I shall have no objection: otherwise, I shall be obliged to do

that which will not be agreeable to you. If you are his creditor, or Mr. Gilling, it will be your interest to write to him, and settle the same immediately."

On the part of the defendant it was submitted that the plaintiff had failed to comply with his undertaking to give material evidence in Middlesex, and consequently must be nonsuited. On the other hand, it was insisted that the letters of the 31st of December, 1842, and 12th of May, 1843, *coupled with the defendant's answers thereto*, were sufficient evidence of a contract in Middlesex to satisfy the condition of the rule.

By the direction of the learned judge, a verdict was taken for the plaintiff, damages 39*l.*, with leave for the *defendant to move [*11 to enter a nonsuit, if the court should think the undertaking had not been satisfied.

Shee, Serjt., moved accordingly. He submitted that, although the posting of a letter might be material evidence in the county in which it was posted; *The King v. Sir Francis Burdett*, 4 B. & Ald. 95; its receipt had never been held to make it material evidence in the county in which it was received. The learned serjeant referred to *Curtis v. Drinkwater*, 2 B. & Ad. 169; *Lindley v. Bates*, 2 C. & J. 659, 2 Tyrwh. 746; *Collins v. Jenkins*, 4 N. C. 225, 5 Scott, 589.

Byles, Serjt., now showed cause. The case of *Lindley v. Bates* is not to be distinguished from the present. It was there held that an undertaking to give material evidence in the county to which the venue is restored, in an action for goods sold and delivered, is satisfied by proof of letters, containing invoices of goods, having been put into the post-office in that county at the time the goods were forwarded. [ERLE, J. Any evidence tending to establish the issue, or to increase the damages, satisfies the undertaking; much weaker letters than these have been held sufficient.]

Shee, Serjt., (with whom was *Poulden*.) in support of his rule. No doubt, very slight evidence is required to satisfy the undertaking; but no case has gone the length of holding that evidence such as that given here will do. [MAULE, J. The letter of the 31st of December, 1842, coupled with the defendant's reply, and his subsequent letters in answer to demands of payment, proved the whole case, with the exception of *Kerrison's agency*. *CRESSWELL, J. The letters proved that the [*12 defendant had obtained the goods from the person carrying on business at Southampton: they admitted the contract with *Kerrison*; and it being afterwards proved that *Kerrison* was the agent of the plaintiff, how can it be said that they were not material evidence?] The contract was made, and the goods delivered, in Hampshire; (a) the invoice, or duplicate of particulars, as it is called, which was enclosed in the letter

(a) The goods appear to have been sold at, and sent from, Southampton. The county of the town of Southampton is a county of itself, long since severed from Hampshire or the county of Southampton. It must therefore have been incorrectly sworn, on the part of the defendant, that the whole cause of action arose in Hampshire.

of the 31st of December, 1842, does not bring the case within the principle of the decision in *Lindley v. Bates*. There, the invoice came *with the goods*; here, it was neither forwarded at the time, or by the person who sent the goods. Standing alone, therefore, the letter of the 31st of December, 1842, was no evidence at all: and it can derive no aid from the defendant's letters written and posted in Hampshire, wherein he distinctly refuses to recognise the plaintiff as his creditor. If this sort of evidence be held sufficient to fulfil the undertaking entered into, it will be impossible to change the venue in an action for goods sold and delivered.

MAULE, J. There can be no doubt that the evidence given in this case to satisfy the plaintiff's undertaking, was material. The moment the agency of Kerrison was established, the correspondence proved the whole case. The defendant's letter of the 16th of May, 1843, in reply to the letter addressed to him by Johnson on the 12th, was very material.

CRESSWELL, J., and ERLE, J., concurring, Rule discharged.

*13]

*GERISH v. CHARTIER. Jan. 13.

In an action for making and fixing iron railing to certain houses belonging to the defendant, the defence was, that the credit was given to A., by whom the houses were built under a contract, and not to the defendant. A., who had become a bankrupt since the railing was furnished, being called as a witness, and having stated that the order was given by him, was asked what was the state of the account between himself and the defendant in reference to the building of the houses at the time of his bankruptcy, to which he replied that the defendant had over-paid him by 350*l.*:—*Held*, that this evidence was properly received.

Assumpsit, to recover the value of certain iron railing and iron coping, &c., alleged to have been made by the plaintiff on the order of the defendant. The first count of the declaration alleged a contract for making and fixing iron railing and coping for twelve houses; that the contract was performed by the plaintiff as to six of the houses, and that the defendant discharged him from the performance of it as to the other six, and would not permit him to fix the railing to those houses, and refused to pay. There was a second special count alleging a similar contract as to certain fences and gates; and also counts for work and labour, goods sold and delivered, and on an account stated. The defendant pleaded non assumpsit, and also several special pleas, upon which no question arose. The particulars of the plaintiff's demand were as follows:—

“This action is brought to recover the sum of 157*l.* 13*s.* 9*d.*, in respect of the following items:—

“To preparing and fixing, to six houses, strong iron railing,	£	s.	d.
on very superior saddle-back coping, as agreed, at 10 <i>l.</i>			
per house	-	-	-
			60 0 0
“To preparing and fixing five cross-road fences, 145 feet, at			
2 <i>s.</i> 9 <i>d.</i>	-	-	-
			22 12 9

"To preparing, for six houses, iron railing and coping to your order, now ready to fix as above	60	0	0
"To an extra cross fence prepared, and to an extra for making coach gates to your order, after the others being made	15	0	0
	<hr/>		
	£157	13	9

"The plaintiff also seeks to recover the above sum of 157l. 13s. 9d. under an account stated between the plaintiff and the defendant.

"Above are the particulars of the plaintiff's demand for which this action is brought; and the plaintiff will rely on the whole, or any part, of the declaration for the recovery thereof."

The cause was tried before CRESSWELL, J., at the second sitting in London in Trinity term last. The plaintiff having called two witnesses, who proved a *prima facie* case, the defendant called one Amos, a builder, for the purpose of showing that the order for the goods had been given by him, and not by the defendant. The substance of his evidence was, that he, the witness, having taken eight acres of building land at Hackney, underlet a portion of it to the defendant Chartier, for whom he contracted to build thereon six cottages, at a certain price; and that he, the witness, contemplating the erection of other six cottages adjoining those of Chartier, gave an order to the plaintiff, on his own account, for the railing, &c., for the twelve cottages, Chartier being present. The contract between Chartier and Amos was offered in evidence; but being objected to on the part of the plaintiff, it was withdrawn. The defendant's counsel proposed to ask Amos, who had become a bankrupt since this transaction took place, what was the state of the account between him and Chartier at the time of his bankruptcy. This, however, was objected to, and the learned judge thought it not the proper form in which to put the question. Amos was then asked:—"Have you received money from Chartier, in advance, on account of these cottages?" To which he answered in the affirmative. He was further asked:—"Including the charge which you had against him for the iron railings, and other parts of the building, at the time of your bankruptcy, how was the balance of the account between you and Chartier?" To which his reply was: "He had overpaid me by 350l."

On the part of the plaintiff it was insisted that the state of the account between Amos and Chartier was not admissible in evidence; that it was *res inter alios acta*; and that the inquiry was calculated improperly to influence the jury.

The learned judge, however, thought the evidence admissible to show, as a fact, that the defendant had actually paid Amos, the person with

whom he had contracted, for the railing for which the plaintiff sought to charge him in this action.

The jury having returned a verdict for the defendant,

Shee, Serjt., obtained a rule nisi for a new trial, on the ground that the foregoing questions, as to the state of the account between Amos and Chartier, ought not to have been allowed to be put.

Byles, Serjt., (with whom was *Butt*,) showed cause. The question being by whom the order for the goods was given, it was material for the defendant to show that Amos, and not himself, was the real debtor. The evidence was important, and was clearly admissible. The defendant dealt with Amos and paid him. The inquiry objected to was most cogent evidence to show that the relation of principal and agent did not (as had been suggested on the other side) subsist between Amos and the defendant, but that the order for the goods was given by Amos on his own

*16] account. It showed that *Amos was the principal, and that the plaintiff knew it. *De Rützen v. Farr*, 4 A. & E. 53, 5 N. & M. 617, overruling *Doe dem. Lord Teynham v. Tyler*, 6 Bingh. 561, 4 Moo. & P. 377. Suppose there was any doubt as to the admissibility of the evidence, it was not necessary to the defendant's case, as it lay upon the plaintiff to establish a contract between the defendant and himself. [MAULE, J. You might have done very well without it.] The defendant's case was so strong without it, that if the verdict had been for the plaintiff, it must have been set aside. In *Crease v. Barrett*, 1 C., M. & R. 919, 5 Tyrwh. 458,(a) it was held that where evidence has been improperly rejected, the party offering it is entitled to a new trial, unless a verdict for that party would be clearly against the weight of evidence, even with the addition of the rejected evidence. This exception applies as well to the admission as to the rejection of evidence. [ERLE, J. In *Crease v. Barrett*, a new trial was granted.] But the court say: "In some cases, no doubt, the court may refuse a new trial when the witness has been improperly rejected; as, where the fact which such evidence was to establish, was proved by another witness, and not disputed; *Edwards v. Evans*, 3 East, 451; or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of evidence, and *certainly* set aside upon application to the court as an improper verdict. We cannot say, however strong our opinion may be on the propriety of the present verdict, that if the lease had been received, it would have had no effect with the jury, nor that it is clear beyond all doubt, if the verdict had been for the defendant, that it would have been

*17] set aside as improper."(b) The court therefore *fully recognise the exception, although they hold that the particular case does not fall within it.

Shee, Serjt., (with whom was *Bramwell*,) in support of his rule. The

(a) And see 2 M. & G. 627.

(b) 1 C., M. & R. 933.

evidence in question was not pertinent to the issue between the plaintiff and defendant, and was only calculated unfairly to influence the minds of the jury. The plaintiff was no party to the statement of accounts between the defendant and Amos.

MAULE, J. The evidence was material, and was properly admitted. It tended to show that the defendant was not seeking to evade payment for goods ordered for his benefit, but that he had actually paid the person with whom alone he had contracted. It showed that the defendant conducted himself like a party who was dealing with Amos as a principal, and not as an agent. The jury might probably have come to the same conclusion without the evidence.

CRESSWELL, J. I entertained some doubt at the trial whether the evidence in question was not *res inter alios acta*: but I am now clearly of opinion that it was properly admitted. A considerable body of evidence had been given by the plaintiff to show that Amos interfered in the matter as the defendant's agent, which this evidence went directly to negative.

ERLE, J. In an action for goods sold and delivered, a general form of defence is, "I am liable to pay another person," and in such cases the jury usually come to the conclusion that the defendant wants to keep the goods without paying for them. Here, therefore, it was material for the defendant to show the bona fides of his defence, by proving payment to such third person; and that was the effect of the evidence in question.

Rule discharged.

***JAMES ELIOT v. THOMAS ALLEN, WILLIAM THOMAS [18
TYAS, WILLIAM WESTERN, WILLIAM HICKS, JAMES
ELLIS, ROBERT SEMPLE, and WILLIAM BEAVAN.**

In trespass against several defendants, where all are implicated in one joint act of trespass, the damages must be assessed against all jointly, though all may not have been equally culpable.

By an act for regulating the relief and employment of the poor of the parish of A., and for other local purposes, it is enacted that no action shall be commenced against any person for any thing done in pursuance of that act, until after twenty-one days' notice, &c. In trespass against parish officers appointed under the act, for imprisoning the plaintiff in the workhouse upon a supposition that he was in a dangerous state of insanity:—*Held*, that the defendants, not having pursued the course pointed out to parish officers by the 9 G. 4, c. 40, with regard to pauper lunatics, and therefore not being protected by that act, were not entitled to notice of action under the local act.

TRESPASS. The declaration stated that the defendants, on the 29th of November, 1842, with force and arms, assaulted the plaintiff, and then seized and laid hold of him, and with great force and violence pulled and dragged him about, and then forced and put upon him a strait-waistcoat, and then imprisoned the plaintiff, and forced and compelled him to go; and caused him to be forcibly carried and conveyed to a

certain workhouse, and there imprisoned the plaintiff, and kept and detained him in prison there, and amongst divers paupers, and divers diseased, disordered, and dirty persons, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of one week, then next following: and at the expiration of that time, to wit, on the 6th of December, 1842, with force and arms, forcibly carried and conveyed the plaintiff to a certain police-office, and before one J. B. G., Esq., then there sitting as one of the metropolitan police magistrates, when the plaintiff was discharged out of the said custody and imprisonment; and by means of the premises, he the plaintiff during the time aforesaid suffered and underwent great pain and anguish of body and mind, &c. &c.

*19] The defendants (with the exception of Beavan, who suffered judgment by default) pleaded—first, not guilty. Secondly, that before and at the time of the committing of the trespasses in the declaration mentioned, the defendants Allen, Tyas, and Western, were overseers of the poor of the parish of St. Mary, Islington, in the county of Middlesex, duly and according to law in that behalf constituted and appointed; that the defendant Hicks was the relieving officer of the said parish, duly and according to law in that behalf appointed; that the defendant Ellis was the master of the workhouse of the said parish, in like manner appointed; and that the defendant Semple was the medical officer of the said parish, in like manner appointed; that the defendants respectively, in such their respective capacities, were respectively intrusted with the control and management and superintendence of the said workhouse, and of the inmates thereof, and of the poor of such parish who were chargeable thereto, and the sending to and receiving them into the said workhouse: that the defendants in their respective capacities as aforesaid, before the committing of the said several trespasses in the declaration mentioned, to wit, on the 28th of November, 1842, had received information, which they verily believed to be true, that the plaintiff was then in a certain dwelling-house in the said parish, with no apparent means of support, and was a lunatic and in an unsound state of mind, and incapable of taking care of himself or controlling his actions, and was also behaving in a violent, uncontrollable, and insane manner, and was likely to injure himself and others, and to endanger his own life and that of others, and that no one could discover who he was, nor what was the place of his legal settlement; and therefore the defendants, in such their respective capacities as aforesaid, did, as was their duty in that behalf, make immediate inquiry into the premises, and did discover, and the fact then

*20] was, that the plaintiff was then in the said dwelling-house, and had no apparent means of support, and was then a lunatic and of unsound mind and incapable of taking care of himself or controlling his actions, and behaving in a violent, uncontrollable, and insane manner, and likely to injure himself and others, and to endanger his own life and that of others, and

that he could give no account of himself, nor could any one discover which was the place of his legal settlement; and thereupon, because it was absolutely necessary, in order to take care of and protect the plaintiff and prevent him from injuring himself and others, and endangering the lives of himself and others, and because the defendants could not otherwise take care of and protect the plaintiff and prevent him from injuring himself and others, and endangering his own life and that of others, they did, to wit, on the day and year in that behalf mentioned, necessarily and unavoidably seize and lay hold of the plaintiff and put upon him a strait-waistcoat, the same being then necessary in that behalf, and carry and convey him to the said workhouse, the same being a proper, safe, and convenient place in that behalf, using no more force and violence and constraint than was necessary, reasonable, and proper, in that behalf, and did remove the said strait-waistcoat as soon as it was safe so to do, to wit, on the morning next ensuing the day on which the plaintiff had been so brought to the said workhouse, and did also keep and detain the plaintiff in the said workhouse for a reasonable time in that behalf, to wit, the time in the declaration in that behalf mentioned, and no more, for the purpose of taking, and did then take, due and proper care of the plaintiff, and made all due and proper inquiries concerning the plaintiff and the place of his legal settlement; and because, at the expiration of the said week, the plaintiff was not recovered of his *malady* *aforesaid, but continued of unsound mind and incapable of protecting himself or controlling his actions, and likely to injure both himself and others, and endanger the lives of himself and others, and the defendants could not discover who he was, nor to what parish he was legally chargeable, they did afterwards, to wit, on the day and year in that behalf in the declaration mentioned, carry and convey the plaintiff to the said police-office in the declaration mentioned, to give information of the state of the plaintiff to the said magistrate in the declaration mentioned, to be dealt with accordingly; as they lawfully might, for the cause aforesaid—verification. [21

Thirdly as to imprisoning the plaintiff and keeping and detaining him in the said workhouse, to wit, for the time in the declaration in that behalf mentioned, and carrying and conveying the plaintiff to the said police-office as in the declaration also mentioned—that, before and at the time of the committing of the trespasses in the introductory part of this plea mentioned, the defendants were respectively such overseers of the poor, relieving officer, master of the said workhouse, and medical officer, as in the said last plea mentioned, and as such had the care and control, management, and superintendence of the said workhouse therein also mentioned, and the inmates thereof, and the receiving into the said workhouse the poor of the said parish: that, before and at the time of the committing of the said trespasses in the introductory part of this plea mentioned, the plaintiff had been brought to the said workhouse as and

the plaintiff was then, a person of unsound mind, and incapable of taking care of himself or of controlling his actions, and likely to injure himself and others, and to endanger his own life and that of others, if not restrained and prevented from so doing, and who had no then present means of subsistence, and could give no account of himself or of the *22] parish to which he was legally chargeable, *and who was then a person fit and proper to be received into the said workhouse, and whom the defendants in such their respective capacities as aforesaid were then bound to receive: and that, during all the time last aforesaid, the plaintiff was a person of unsound mind, and incapable of taking care of himself or of controlling his actions, and was likely to injure himself and others, and endanger his own life and that of others; and thereupon, because it was absolutely necessary, in order to take care of and protect the plaintiff, and because he could not be otherwise taken care of and protected, and because he would otherwise have injured himself and others, and endangered the lives of himself and others, and that the defendants might have time to discover who the plaintiff was, and to what parish he was legally chargeable, the defendants did, necessarily and unavoidably, for the reasons and purposes last aforesaid, imprison the plaintiff and keep and detain the plaintiff as in the introductory part of this plea mentioned, using no unnecessary violence to the plaintiff, nor keeping the plaintiff so imprisoned and detained for any longer time than was necessary and proper for the reasons and purpose aforesaid, and did, at the end of such detaining and imprisoning, carry and convey the plaintiff to the said police-office, to give information to the said magistrate in the declaration mentioned of the state of the plaintiff, in order that the plaintiff might be dealt with according to law, as they lawfully might, for the cause aforesaid—verification.

Fourthly,—as to the trespasses in the introductory part of the last plea mentioned,—leave and license.

Fifthly, that the trespasses in the declaration mentioned were acts, and each and every one thereof was an act, done and committed by the defendants after the passing of a certain act of parliament made and *23] passed in the 5th year of the reign of G. 4, intituled “An act *to repeal several acts for the relief and employment of the poor of the parish of St. Mary, Islington, in the county of Middlesex, for lighting and watching and preventing nuisances and annoyances therein, for amending the road from Highgate through Maiden Lane, and several other roads in the said parish, and for providing a chapel of ease and an additional burial-ground for the same, and to make more effectual provisions in lieu thereof;” and also after the passing of a certain other act of parliament made and passed in the session of parliament held in the 5 & 6 Vict. (c. 97,) intituled “An act to amend the laws relating to double costs, notices of action, limitation of action, and pleas of the general issue, under certain acts of parliament:” and that the trespasses

in the declaration mentioned were things, and each and every of the said trespasses was a thing, done in pursuance of the act of parliament in this plea first above mentioned ; and that no notice of commencing this action was given to the clerk to the trustees in the said first act mentioned one calendar month before the commencing of the said action, pursuant to the statutes in such case made and provided—verification.

The plaintiff joined issue on the first plea, replied *de injuriâ* to the second and third, traversed the leave and license alleged in the fourth, and, to the fifth, replied that the trespasses in the declaration mentioned were not, nor were any of them, things, nor was either of them a thing, done in pursuance of the said act of parliament in that plea first mentioned, *modo et formâ*. Issue thereon.

The cause was tried before TINDAL, C. J., at the sittings at Westminster after last Easter Term. It appeared that, in the month of November, 1842, information was conveyed to Messrs. Tyas and Western, the two overseers of the poor of the parish of St. Mary, Islington, *(ap- [24 pointed under a local act, 5 G. 4. c. cxxv. s. 31,) by the landlord of the house in which the plaintiff resided, and also by a letter addressed to them by the chief clerk at the police-office Clerkenwell, pursuant to a direction from one of the sitting magistrates, that the plaintiff was in a dangerous state of insanity and in circumstances of great apparent destitution ; whereupon they sent Hicks, the relieving officer, accompanied by Beavan, to convey him to the workhouse. The defendants Hicks and Beavan accordingly proceeded to the residence of the plaintiff, placed a strait-waistcoat upon him, and forcibly carried him to the workhouse, where he was received and detained by Ellis, the master. On the following morning the plaintiff was seen by the defendant Semple, the parish surgeon, who directed that he should be released from personal restraint. After having been kept a week in the workhouse, the plaintiff was taken by Hicks, accompanied by Semple, before the magistrate at the Clerkenwell police-office, who, conceiving that there was no pretence for dealing with him as an insane person under the statute 9 G. 4, c. 40, ordered his immediate discharge.

Conflicting testimony was given as to the state of mind of the plaintiff at the time of this transaction, also as to his pecuniary circumstances ; the plaintiff's witnesses stating, that though somewhat eccentric in his habits, he was perfectly competent to take care of himself, and that, though not in very flourishing circumstances, he was far from being destitute of friends able and willing to assist him ; the defendants' witnesses, on the other hand, detailing a variety of acts and conduct inconsistent with the plaintiff's sanity, or his ability to govern himself with safety to himself or others.

On the part of the defendants it was submitted that the plaintiff was not entitled to recover, inasmuch as there had been no notice of [25 action, as required, it was *contended, by the 148th section of the

5 G. 4, c. cxxv.(a) For the plaintiff it was insisted, that the trespass complained of was not a thing done in pursuance or under colour of the local act; neither were the defendants within the protection of the 9 G. 4, c. 40, with the provisions of which they had failed to comply. The objection was overruled.

His lordship, in summing up, told the jury, that, upon this declaration, the plaintiff could only recover damages against all the defendants jointly in respect of any joint act of trespass committed or assented to by all of
 *26] them: and, after communicating to the respective counsel *the mode in which he proposed to put the case to the jury, he left it to them to say whether or not at the time of the committing of the trespasses complained of, the plaintiff was a dangerous lunatic and in a state of destitution.

The jury returned a verdict for the plaintiff against all the defendants except Allen; damages 400*l*.

Shee, Serjt., in Trinity Term last, moved to enter a nonsuit, on the ground of the absence of a notice of action; or for a new trial, on the grounds of misdirection, that the verdict was against evidence, and that the damages were excessive. If several defendants are jointly found guilty of one trespass, joint damages must be assessed against them all; but, where the acts of trespass charged are, in their nature, severable, so that some may be found guilty of part, and others of other part, the damages may be separately assessed accordingly. The Lord Chief Justice, therefore, erred in telling the jury that, upon this record, they could only give joint damages against all the defendants. The consequence of that direction was, that heavy damages were given against some of the defendants who did comparatively little of that which is complained of. The defendant Semple, for instance, was no party to the removal of the plaintiff to the workhouse, or to placing him under the restraint of a

(a) Which enacts, "that no action or suit shall be commenced against any person for any thing done in pursuance of this act, until *twenty-one days' notice* shall be thereof given in writing to the clerk to the said trustees, nor after sufficient satisfaction, or tender thereof, hath been made to the party or parties aggrieved, nor after six calendar months next after the fact committed for which such action or suit shall be so brought; that all such actions or suits shall be laid and tried in the county or place where the cause of action shall have arisen; and that the defendant or defendants in such action or suit, and every of them, may plead the general issue, and give this act, and the special matter, in evidence at any trial or trials which shall be had thereupon, and that the matter or thing for or on which such action or suit shall be brought, was done in pursuance and by authority of this act; and if the said matter or thing shall appear to have been so done, or if it shall appear that such action or suit was brought before *twenty-one days' notice* thereof given as aforesaid, or that such sufficient satisfaction was made or tendered as aforesaid, or that such action or suit was not commenced within the time limited, or was laid in any other county or place than as aforesaid, then the jury shall find for the defendant or defendants therein; and if a verdict shall be found for the defendant or defendants, or if the plaintiff or plaintiffs in such action or suit shall be nonsuited, or suffer a discontinuance of such action or suit, or if upon a demurrer in such action or suit, judgment shall be given for the defendant or defendants therein, then and in either of the cases aforesaid, such defendant or defendants shall have treble costs, and shall have such remedy for recovering the same as any defendant or defendants may have for his, her, or their costs in other cases, by law.

See the 5 & 6 Vict. c. 97, ss. 3, 4, 5.

strait-waistcoat; that was the act of Hicks and Beavan only: and, although Semple appeared before the magistrate, he did so only in his capacity of medical officer, to speak to the state of the plaintiff. Again, Ellis, the master of the workhouse, did no more than receive the plaintiff, as he was bound to do, when brought there. [TINDAL, C. J. All the defendants were shown to have been parties assenting to the trespass.] In *Austen v. Willward*, Cro. Eliz. 860, in trespass for *a battery, [*27 two of the defendants pleaded son assault demesne; the third pleaded not guilty; both issues were found for the plaintiff, and several damages found against those who pleaded severally: and it was ruled to be ill; for it is one joint and entire offence by the plaintiff's action; and, when all are found equally guilty, the damages ought to have been entire. But it was said, that, "if in trespass against divers, the one be found guilty in part, and the others in all, there the damages shall be several." So, in Sir John Heydon's case, 11 Co. Rep. 5 a,(a) it was resolved, that, where in trespass against several defendants, they plead not guilty, or several pleas, and the jury find for the plaintiff in all, the jurors cannot assess several damages against the defendants. But that, in trespass, if the jury find one guilty at one time, and the other at another time, several damages may be taxed; though, if the plaintiff himself confesses that they committed the trespasses severally, the writ shall abate. In *Rodney v. Strode*, 3 Mod. 101, which was an action on the case against three defendants, one of whom suffered judgment by default, and the other two pleaded not guilty, on a verdict for the plaintiff, the damages were assessed separately against the two who pleaded.(b) *Player v. Warn*, Cro. Car. 54, was an action upon the case sur trover and conversion of 2000 loads of coals; upon not guilty pleaded, the defendants were found guilty severally for several loads of coals, and were found severally not guilty for the residue, and judgment accordingly, and entire costs, and one ideo in misericordia against the defendants, and one ideo in misericordia against the plaintiff pro falso clamore; and thereupon a writ of error was brought into the Exchequer Chamber, *and the error [*28 assigned, because the judgment was against both the defendants for the several damages severally, for it was alleged that several damages ought not to have been assessed, but, there being a joint trover and conversion laid to their charge, they ought to have been both found guilty, and they ought not to have been divided in the verdict and in the assessing of damages; and, if they might be severed, yet the plaintiff ought to have but the damages given against one of them, as it is in Sir John Heydon's case, and 44 Ed. 3, 7.(c) But all the justices and barons

(a) *S. C. Heydon v. Stiles*, Brownl. & G. 233; *Cobbe v. Sir John Heydon*, 1 Roll. R. 30, in error.

(b) 1000*l.* against Strode, and 50*l.* against the other. Rodney took his judgment against Strode only, and entered a nolle prosequi as to the others.

(c) *Doane v. Darby and Others*, T. 44 E. 3, fo. 7, pl. 3, for false imprisonment in Dorsetshire. In that case all the defendants but Darby pleaded not guilty, which was found against them,

agreed "that the plaintiff should have several damages; for, being found severally guilty of several parcels converted, he shall have judgment accordingly; and it is not like Sir John Heydon's case, where there was but one joint and sole trespass of battery, and so found; and there, although the damages were severally assessed, yet the plaintiff ought to take his judgment for damages but of one. But, where the trespass is several, and so found, as in this case, viz., the one at the one time, and the other at another, although it be contrary to the supposal of the writ, yet being found by verdict, it shall not abate the writ, and the plaintiff shall recover according to the verdict, as it is said there in Heydon's case. So, here, this being severally found, and the conversion by them severally of several things, the damages are well assessed severally, and he shall have judgment against them severally for damages according to the verdict." And

*29] it was said that there were divers precedents in the *King's Bench and Common Bench to that purpose. The second error assigned was, that there ought to have been several judgments *de iedo* in misericordia against the defendants, and, being otherwise, it is error; but against that it was also resolved that there shall be one judgment only of misericordia, although the defendant be severally found guilty. In *Sampson v. Cranfield and Upton*, 1 Bulstr. 157, in trespass for assault and battery against two, the court held that the jury did well in assessing several damages, and distinguished the case from a trespass in cutting down and carrying away trees, and said that the latter is a joint act, but that the battery of one cannot be the battery of the other. In a note to Sir John Heydon's case, in Thomas and Fraser's edition of Coke's Reports, 11 Co. Rep. 5 b, it is said: "This case (*Sampson v. Cranfield*) is denied to be law in 2 Danv. 445, pl. 3.: and the law as stated by Coke has been fully established;" referring to *Hill v. Goodchild*, 5 Burr.

*30] 2792,(a) and **Brown v. Allen*, 4 Esp. N. P. C. 158. [TINDAL, C. J. The cases you cite are all cases where the acts of the several parties

with 100 marks damages. After this verdict Darby, who had not pleaded before, pleaded that the plaintiff was his villein, regardant to his manor of A. But this point having, pending this writ, been found against Darby in another action by the same plaintiff against the same defendants for a battery in Wiltshire, the question was, whether Darby had thereby become jointly liable with the others, for the 100 marks.

(a) In this case Lord Mansfield, delivering the opinion of the court of King's Bench, said:—"We hold, that, as the trespass is *jointly* charged upon both defendants, and the verdict has found them both *jointly* guilty, the jury could not afterwards assess several damages. [His lordship particularly mentioned the cases of *Austen v. Willward*, the fifth resolution in Sir John Heydon's case, the case of *Crane and Hill v. Hummerstone*, in Cro. Jac. 118, the case of *Rodney v. Storde*, in Carthew, 19, and Jenkins's Cent. 317, pl. 10, as warranting this opinion.] We do not think that the present case calls for an opinion upon those cases where the defendants are charged jointly and severally; or where the defendants plead severally; or where the defendants are found guilty of several parts of the same trespass, or at a different time; or where a joint action is brought for two several trespasses, and the damages, found severally, as being severally guilty. We don't meddle with any of these cases; there is a variety of opinions in the books relating to them. It is enough for us to found our present determination upon the present case. And the present case is, that the count is of a *joint* trespass; and the jury have found the defendants guilty of a *joint* trespass, and yet have severed the damages. We are of opinion that in such case the damages cannot be severed."

clearly called for separate damages. The facts of this case do not seem to me to bring it at all within that rule: it was one joint trespass. The defendants had the advantage of a diminished responsibility by the mode in which the question was presented to the jury.]

The summing up necessarily led the jury to conclude that it was essential for the defendants to establish, not only that the plaintiff was a lunatic dangerous to himself and others, but also that he was in a state of destitution and distress; whereas, it was enough if they proved so much of their pleas as amounted to a justification; they were not bound to prove every fact alleged; *Atkinson v. Warne*, 1 C., M. & R. 827, 5 Tyrwh. 481, 3 Dowl. P. C. 483, 6 C. & P. 687. Upon the evidence (which the learned serjeant very elaborately reviewed) it was clearly proved that the plaintiff was a dangerous lunatic, and therefore the defendants were entitled to a verdict upon the issues taken on the second and third pleas.

As to the damages, they were outrageously excessive. The defendants were public officers: it was admitted that they were acting honestly, and under a sense, however mistaken, of duty. It appears from a return recently made to parliament, that about one tenth of the pauper population of England are lunatics; and of these, the overseers of the respective parishes are by law the guardians: and it further appears, that, of 7000 pauper lunatics in actual confinement, 3259 are dangerous lunatics. What a fearful responsibility might not these parish officers have incurred if they had shrunk from the performance of their duty in this case!

TINDAL, C. J. It appears to the court to be right to grant a rule to show cause, on the ground that the verdict is against the weight of evidence as against all the defendants, and also on the ground of excessive damages. The rule will also, of course, go for a nonsuit, on the ground of want of notice of action. But, as to the rest, we think there should be no rule. The facts of the present case do not bring it within the principle of those that have been cited. All the defendants were guilty of the same trespass, or not guilty at all. Nor do we think the defendants are now entitled to complain that the two allegations in the pleas were put conjointly to the jury: that course was assented to by the learned counsel at the time.

Talfourd, Serjt., (with whom was Barstow,) now showed cause. [He was directed by the court to confine himself, at first, to the question upon the statute.] This was not an action brought for a thing done in pursuance of the local act, 5 G. 4, c. cxxv. The title of that act is, "An act to repeal several acts for the relief and employment of the poor of the parish of St. Mary, Islington, in the county of Middlesex; for lighting and watching, and preventing nuisances and annoyances therein; for amending the road from Highgate through Maiden Lane, and several other roads in the said parish; and for providing a chapel of ease and an additional burial-ground for the same; and to make more effectual provisions in lieu thereof:" and the whole of its provisions are addressed to

the carrying these local objects into effect. In *Shattoell v. Hall*, 10 M. & W. 523, 2 Dowl. N. S. 567, the cases were not cited. It is perfectly idle to say that there is any thing in the act to justify the outrage committed upon this plaintiff.

*32] The learned serjeant was stopped by the court, who called on—
**Shee and Byles*, Serjts., (with whom was *Warren*,) to support the rule on this point. This case is very important, as it affects not only the question of notice of action, but also any tender of amends. The defendants (with the exception of *Beavan*) were all parochial officers appointed under the 5 G. 4, c. cxxv.; *Tyas* and *Western*, the overseers, under s. 31; *Sticks*, the relieving officer, under s. 49; and *Ellis*, the master of the workhouse, and *Semple*, the medical officer, under s. 14. Every thing they did in this case was fairly done and *bonâ fide* in pursuance of the act; and, being appointed under it, they were clearly entitled to the protection given by the 148th section for acts done by them in supposed pursuance of the powers and authorities given to parochial officers under the 9 G. 4, c. 40, ss. 37, 38, and 44, notwithstanding the authority so given to them by that act was not strictly observed. In *Cook v. Leonard*, 6 B. & C. 351, 9 D. & R. 339, (a) *BAYLEY, J.*, thus lays down the rule: “Where a statute gives protection to persons acting in execution or in pursuance of it, all persons acting under its provisions are entitled to that protection, although they exceed their authority by so doing. There must, however, be some limits to that rule; and it seems to me that there are cases which warrant this distinction. If an officer does any act, part of which is and part of which is not authorized by the statute; or, if a magistrate act in a case which his general character authorizes him to do; the mere excess of authority in either case does not deprive the officer or magistrate of that protection which is conferred upon those who act in execution of it: but, where there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to that “protection.” The statute 21 Jac. 1, c. 12, s. 5, directs that actions against justices of the peace, for any thing done by virtue or reason of their office, shall be laid in the county where the fact is committed. The 24 G. 2, c. 44, s. 8, enacts that no action shall be brought against any justice of the peace, for any thing done in the execution of his office, unless commenced within six calendar months after the act committed. The 10 G. 4, c. 44, s. 1, empowers the Crown to appoint two justices of the peace for the counties therein named, to execute the duties of a justice of peace at the metropolitan-police office; and sect. 41 directs that all actions against any person for any thing done in pursuance of that act shall be laid in the county where the fact is committed, and be commenced within six calendar months after the fact is committed. The 2 & 3 Vict. c. 71, s. 1, makes the justices of the several police courts of the metropolis, justices of the

(a) And see 4 Mann. & R. 1797, 3 M. & G. 196, 4 M. & G. 314.

same counties. Other sections give such justices additional powers not possessed by ordinary county justices. By sect. 55 the act is to be construed as one with the 10 G. 4, c. 44; and sect. 53 enacts that no action shall be brought against any person for any thing done in pursuance of the act, unless commenced *within three calendar months* after the act committed, and brought in *the county of Middlesex*. In the case of *Hazeldine v. Grove*, 3 Q. B. 997, 3 Gale & D. 210, it was held, that actions for any thing done by a justice appointed under the 2 & 3 Vict. c. 11, though within the ordinary province of a county justice, must be brought within three months, and the venue must be laid in Middlesex. [MAULE, J. It is so stated in the marginal note, but the judgment proceeded entirely upon another clause.] Lord DENMAN, in delivering the judgment of the court, there says: "The Queen, acting under the power given her by the statute, *appoints an individual, under specified [*34 circumstances, a magistrate of a police court. Both the officer and the court are the creation of the statute law. When so appointed, the statute invests him with the ordinary authority of a justice of the peace, with certain restrictions. It appears to us, therefore, that, when he is exercising the most ordinary jurisdiction of a justice of the peace, he is acting in execution of a power and authority conferred on him *by the act*, as much as a commissioned justice, doing the same thing, would be acting in execution of a power and authority conferred *by the commission*." And, after observing upon the facts, his lordship concluded: "There was a fault in the commencement, which made the whole proceedings illegal: but *these statutory protections suppose an illegality, so that there is no defence on the merits*. For the reasons, however, which we have given, we think there was no illegality of such a palpable nature, no such want of reasonable colour or bona fides, as to disentitle the defendant to notice and the other protection of the statute. [CRESSWELL, J. *Shatwell v. Hall*, 10 M. & W. 523, 2 Dowl. N. S. 567, seems very like the present case. A local act of parliament for lighting, watching, &c. the town of Staleybridge, empowered the commissioners therein named to appoint constables and assistant constables for keeping the peace in the said town, and for executing all such warrants, &c. as the justices of Cheshire or Lancashire should direct to them, to be executed within the town. Another section enacted that no plaintiff should recover in any action against any person for any thing done in pursuance of the act, without twenty-one days' notice of action having been given. It was held that a constable appointed under the act, who was sued in trespass for breaking and entering the plaintiff's house in the town [*35 of Staleybridge, in the execution of a warrant granted by a justice of Cheshire, to search for goods alleged to have been clandestinely removed there to avoid a distress, under the 11 G. 2, c. 19, s. 7, was not entitled to notice of action.] Here, the defendants derive all the authority they have, from the act. The present case, therefore, rather resen-

bles that of *Smith v. Shaw*, 10 B. & C. 277, 5 Mann. & R. 225: there, by an act of parliament, a company was established for making and maintaining certain docks and basins, and was authorized to appoint a dockmaster, who was to have power to direct the mooring, unmooring, moving, and removing of all vessels into or being in the docks, and to have the control over the space of one hundred yards of the entrances into the docks, so far as related to the transporting of vessels coming in or going out; and the company was to be sued in the name of the treasurer; and, if any action should be brought against any person for *any thing done in pursuance of the act*, such action should be commenced within six calendar months after the fact committed. An action having been brought against the treasurer for an injury done to a vessel (within one hundred yards of the entrance to the docks) by reason of improper directions having been given by the dockmaster in transporting her into the docks; it was held that the giving of such directions was a thing done in pursuance of the act of parliament, and that the action ought, therefore, to have been brought within six calendar months after such directions were given. BAYLEY, J., in delivering the judgment of the court, said: "The language of the provision in the commercial-dock act, 50 G. 3, c. ccvii. s. 94, is, 'that, if any action shall be brought against any person, or body politic, for any thing done in pursuance of

*36] those acts, such action shall be brought within 'six calendar months next after the fact committed; or, in case there shall be a continuation of damages, then within two months after the doing or committing such damages shall have ceased; and the action shall be laid and brought in the county where the matter in dispute shall arise, and not elsewhere.' And, according to the decisions upon similar words, a thing is to be considered as done *in pursuance of the act*, where the person who does it is acting honestly and bonâ fide, either under the powers which the act gives, or in discharge of the duties which it imposes. Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties, yet, if he acts bonâ fide in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and is entitled to the protection conferred upon persons whilst so acting. This is established by *Gaby v. The Wilts and Berks Canal Company*, 3 M. & S. 580, *Theobald v. Crichmore*, 1 B. & Ald. 227, *Parton v. Williams*, 3 B. & Ald. 330. *Smith v. Wiltshire*, 2 Brod. & B. 619, 5 J. R. Moore, 322, and *Cook v. Leonard*, 6 B. & C. 351, 9 D. & R. 339, establish the same point as to constables and other persons acting in obedience to a justice's warrant." If the protecting clause had been in the 9 G. 4, c. 40, the defendants would clearly have been entitled to notice; and these authorities show that they are not the less so entitled because the clause is found in the local act.

MAULE, J.(a) I entertain no doubt whatever that the meaning of the

(a) Tindal, C. J., was still engaged on the case of the Crown Jewels.

local act is, that the overseers appointed under it should be subject to all the liabilities and entitled to all the immunities with which overseers generally are clothed. The 148th section seems to me to have [37] ample employment without giving to it the extensive operation that has been contended for. That which was decided by the court of Queen's Bench in *Hazeldine v. Grove*, 3 Q. B. 997, 3 Gale & D. 210, was this:—The police act 2 & 3 Vict. c. 71, which confers certain additional powers upon police magistrates appointed by the Queen, provides by sect. 53, that no action shall be brought against any person for any thing done in pursuance of that act, or in the execution of the powers and authorities given by it, unless commenced within three calendar months after the act committed, and laid and brought in the county of Middlesex; and the court decided, that, in the latter of these alternatives, the magistrate was entitled to the protection of the fifty-third section, when exercising the ordinary authority of a justice of the peace. That is quite consistent with the view we take of the present case, and also with *Shatwell v. Hall*, 10 M. & W. 523, 2 Dowl. N. S. 567; which latter case would be clearly inconsistent with any other determination than that to which we now come.

CRESSWELL, J., and EARLE, J., concurred.

Talfourd, Serjt., then proceeded to show cause against the other branch of the rule. Many of the allegations in the special pleas altogether failed in proof. But, assuming it to have been satisfactorily established that the plaintiff had exhibited unequivocal symptoms of mental aberration, it is quite clear that that would afford no justification whatever for the extraordinary course pursued by these defendants. The statute 9 G. 4, c. 40, points out (sects. 38, 39, 40, 41, and 42) the duties of overseers in respect of insane persons chargeable to the parish; and sect. 44 enacts, that, "upon its being made known to any justice of the peace [38] that any person wandering about and at large within his jurisdiction is deemed to be insane, it shall be lawful for such justice, by an order under his hand and seal, if he shall so think fit, to require the constable or churchwardens and overseers of the poor of the parish or place where such person is found, or some of them, to bring the said person before any two justices of the peace of the said county, at such time and place as shall be appointed by the said order; and the said justices are thereby required to call to their assistance a physician, surgeon, or apothecary, at the charge of the said parish or place; and if, upon examination of such person deemed to be insane, or from other proof, the said justices shall be satisfied that such person is so far disordered in his senses that it is dangerous for such person to be permitted to go abroad, the said justices shall make inquiry into the circumstances and place of last legal settlement of such insane person, and it shall be lawful for such justices to proceed in such case in the same manner as has hereinbefore [sect. 38] been directed in the case of a person chargeable to any parish within the jurisdiction of the said justices," &c. [CRESSWELL, J. The second

and third pleas do not set up the statute: the whole, therefore, must be proved to make out a defence.] It is quite clear from the whole of the evidence, that there was no pretence for treating the plaintiff as a dangerous lunatic at the time he was taken to the workhouse; and it is conceded that the defendants altogether failed to make out the allegation that he was without means of support.

As to the damages, seeing the course these defendants (whatever their motive) thought fit to pursue towards the plaintiff, the court cannot say that the amount is so excessive that justice requires that the cause should *39] go *down again. [MAULE, J. The only ground of mitigation here is, that there is no imputation or suspicion that the defendants, in what they did, were actuated by any sinister motive.] In *Anderdon v. Burrows*, 4 C. & P. 210, where the keeper of a private lunatic asylum, by the direction of the plaintiff's friends, who supposed him to be insane, sent his servants with a strait-waistcoat to convey the plaintiff to the asylum, though there was no suggestion that the defendant was actuated by unworthy or improper motives, the jury gave 500*l.* damages, and the court declined to interfere.

Shee and Byles, Serjts., contrà. To sustain the second plea it was enough to show, as the evidence amply did, that the plaintiff was a lunatic, and in a state to be dangerous to himself and others. In Bacon's Abridgment, *Trespass*, (D) 3, (a) it is laid down that "a private person may, without an express warrant, confine a person disordered in his mind, who seems disposed to do mischief to himself or to any other person." So, in Comyns's Digest, *Pleader*, (3 M. 22) (b) it is said, that, to trespass for false imprisonment, "the defendant may plead, that he did it to prevent apparent mischief which might ensue; as to restrain the plaintiff, non-sane, from killing himself or others, burning a house, or *40] other mischief." It is clear, therefore, that the defendants *need no act of parliament to justify their conduct; and that they would have been guilty of a breach of duty if they had refrained from putting the plaintiff under restraint. [CRESSWELL, J. You must show some pressing and immediate danger; so urgent that there was no time to apply to a magistrate for authority to act.] The evidence showed a series of acts of violence on the part of the plaintiff, a repetition of which might reasonably be apprehended. It is not open to the plaintiff to contend, that the plea does not justify the trespasses to their full extent, as he has not replied excess. *Lambert v. Hodgson*, 1 Bingh. 317. As against some

(a) Citing Bro. Abr. *Faux Imprisonment*, pl. 28 and 25, (which is a misprint for 35.)

In pl. 28, the defendant justified imprisoning the plaintiff's wife, for that upon being told that her husband was imprisoned as a Scot (within the allegiance of James, king of Scotland, enemy of our lord the king,) she looked wild as a lunatic (fero come un lunaticke.) The plea was held bad for not alleging that she was wild as a lunatic, and that the defendant was in dread of mischief, &c. This is an abridgment of *Wheale's case*, H. 22, E. 4, fo. 45, pl. 10.

In pl. 35, (citing 22 Ass. pl. 56, where the words are "en aragé,") a justification of beating with rods a person who was ill (malade) and did mischief, was held good.

(b) Referring through Rolle to *Wheale's case*, *suprà* (b).

of the defendants, at all events, the damages are extravagant and out of all proportion to the injury sustained by the plaintiff.

TINDAL, C. J. The branch of the rule last discussed was obtained upon two grounds—first, that the verdict was against the weight of evidence—secondly, that the damages were excessive. With respect to the first ground, it is well known that the courts are extremely cautious in interfering with the province of the jury. And, upon a careful consideration of the whole of the evidence, which was exceedingly voluminous, on both sides, it does not strike me that the jury have taken so unsatisfactory a view of this case as to justify the sending it down to a second investigation on the ground that they have come to a wrong conclusion. On the second ground, however, I must confess that it would be more satisfactory to my mind if the case were to be reconsidered, unless the plaintiff will consent to receive a more moderate compensation for the injury he has sustained than the jury have thought fit to award him. The defendants stand wholly absolved from the suspicion of having acted from sinister or malignant *motives. The most that can be said [*41 is, that they mistook their course.

It was suggested by the Lord Chief Justice that the damages should be reduced to 200*l.*; to which *Talfourd*, Serjt., on the part of the plaintiff, acceded.

Per curiam :

Rule accordingly.

PRESCOTT v. BUFFERY and Eleven Others. Jan. 14.

In a *qui. fa.* against proprietors, on a judgment against a public officer, of a banking company, under the provisions of the 7 G. 4, c. 46:—*Held*, that lists of the proprietors filed at the stamp-office, but not within the time limited by the act, were not receivable in evidence as against the plaintiff, to show that at a given time the garnishees were not proprietors.

SCIRE FACIAS on a judgment obtained against one of the public officers of a joint-stock banking company. Plea: traversing the allegation that the defendants were proprietors of shares at the time of the recovery of the judgment.

At the trial before TINDAL, C. J., at the adjourned sittings in London after last term, it appeared that Warden, one of the garnishees or parties sought to be charged, had been a proprietor of shares in the company, that he had executed the deed of settlement, and paid calls. In order to show that he was a proprietor of shares at the time of the recovery of the judgment, the plaintiff offered in evidence certain lists of proprietors, which had been filed by the company in supposed compliance [*42 with the 7 G. 4, c. 46, (a) in which the name of *Warden appeared.

(a) The fourth section enacts, "that, before any such corporation or co-partnership exceeding the number of six persons in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out,

These lists were objected to, on the ground that they appeared not to have been filed within the time required by the act. His lordship refused to receive them.

*43] *On the part of Warden it was attempted to be shown that he had ceased to be a proprietor before the recovery of the judgment, by producing a letter from him to the directors declaring his inability to pay his calls, and a notice communicating to him a resolution of the directors that his shares should be forfeited, if the calls were not paid by a given day; and subsequently his name was omitted from two of the annual returns to the stamp-office under the statute; which returns were tendered in evidence. These returns not having been filed within the time limited by the act, it was objected, on the part of the plaintiff, that they could not be received. On the other hand, it was insisted that they were admissible, as acts done by the directors. His lordship ruled that they were subject to the same objection as the lists offered on the plaintiff's part, and in like manner rejected them.

Sir *T. Wilde*, Serjt., on behalf of the defendant Warden, now moved for a new trial, on the ground that the last-mentioned lists had been improperly rejected. He submitted that they were clearly admissible, though not conclusive, as evidence that the directors had acted upon the forfeiture; like omissions to give a party notice of meetings, or the like.

TINDAL, C. J. The evidence in question only amounted to declarations made by the directors behind the backs of both Warden and the plaintiff, and clearly was not admissible.

according to the form contained in the schedule marked A. to the act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or co-partnership, and also the names and places of abode of all the members of such corporation, or of all the parties concerned or engaged in such co-partnership, as the same respectively shall appear on the books of such corporation or co-partnership, and the name or firm of every bank or banks established or to be established by such corporation or co-partnership; and also the names and places of abode of two or more persons, being members of such corporation or co-partnership, and being resident in England, who shall have been appointed public officers of such corporation or co-partnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided; and also the name of every town and place where any of the bills or notes of such corporation or co-partnership shall be issued by any such corporation, or by their agent or agents; and every such account or return shall be delivered to the commissioners of stamps, at the stamp-office in London, who shall cause the same to be filed and kept in the said stamp-office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf; and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of 1s. for every search.

And the sixth section enacts, "that a copy of any such account or return so filed or kept and registered at the stamp-office as by the act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or co-partnership, were members thereof at the date of such account or return."

CRESSWELL, J. The evidence offered was, mere declarations by the secretary by order of the directors, that certain persons (omitting the defendant Warden) were, at a given time, the only partners in the concern. *How can the present plaintiff be affected by such declarations? [*44

The rest of the court concurring,

Rule refused.

GRANT and Others v. HUNT, Public Officer of the HAMPSHIRE
Banking Company. Jan. 15.

A., in Genoa, shipped corn to B., in London, and with B.'s authority drew bills upon C., in Southampton, with whom B. had an account. On the 10th of August, 1843, B. wrote to C. that A. had drawn the bills, and requesting C. to accept them to the debit of his account. On the 11th C. wrote to B., acknowledging the receipt of a bill for 2580*l.* to the credit of his account, and concluding, "against this remittance we send you, as requested, bill of lading of Flora, and will accept A.'s drafts," the bills in question. This letter was received by B., in London, on the 12th; and on the same day C. saw B. in London, and informed him that the bills would not be accepted, and that the consent given in the letter of the 11th was countermanded. On the 13th B. communicated to A. the promise to accept, but withheld the fact of the countermand:—*Held*, that the letter of the 11th of August operated as an acceptance, and ensured for the benefit of A., and that B. could not afterwards cancel that acceptance, or release the defendants from their engagement, by consenting to the subsequent countermand.

Quære, whether it is essential that a promise to accept or pay (not on the face of the bill) should be communicated to some party to the bill, or to the holder, or to some agent for such party or holder, in order to bind the person making it.

Assumpsit upon two bills of exchange, the one, for 300*l.*, the other, for 279*l.* 16*s.* 5*d.*, bearing date, respectively, the 3d of August, 1842, and drawn by the plaintiffs, at Genoa, in parts beyond the seas, payable respectively at three months' date, upon the Hampshire Banking Company, who were stated in the declaration to have accepted the same. The declaration also contained counts for money had and received, and upon an account stated.

The defendants pleaded that they did not accept the *bills [*45 or either of them; and to the money counts, that they did not promise.

At the trial, before the Lord Chief Justice at Guildhall, at the adjourned sitting after Trinity Term, 1843, a verdict was found for the plaintiffs for 1000*l.*, the damages laid in the declaration, subject to the opinion of the court upon the following case:—

The plaintiff's are merchants, carrying on business at Genoa, under the firm of Grants, Balfour, & Co., Mr. Charles Balfour, one of the partners in that firm, residing in London. The defendant is one of the registered public officers of the Hampshire Banking Company, who are joint-stock bankers at Southampton, and are the real defendants in this action.

Mr. Henry Baker, a corn-merchant of London, had on occasions previous to that out of which the present action has arisen, ordered cargoes

of corn from the plaintiff's house at Genoa, and which cargoes had been shipped by the plaintiffs at Genoa, consigned to Baker in London; and which cargoes had been on two occasions in part paid for in bills drawn by the plaintiffs, by the direction of Baker, upon and accepted by the Hampshire Banking Company, with whom Baker dealt as a customer.

In the month of June, 1842 [one Magnus, acting under a general authority from] Baker, directed the plaintiffs to purchase on his account from 1000 to 2000 quarters of Indian corn. On the 4th of July, the plaintiffs advised Charles Balfour, and also Baker, (as the fact was,) that they had purchased this corn, and had chartered the Sardinian brig, *Velocifero*, to carry the same to London.

On the 3d of August, the plaintiffs caused the bill of lading of this cargo, and the invoice thereof, amounting to 1159*l.* 12*s.* 10*d.*, to be delivered to Baker. On the same 3d of August, the plaintiffs, by the *46] direction of [Magnus, *the agent of] Baker, drew bills on Messrs. T. W. Smith & Co. for 579*l.* 16*s.* 5*d.*, being half the amount of the price of the said cargo, and at the same time [by the like direction of Magnus, the agent of Baker] drew for the other half on the Hampshire Banking Company, by the two bills of 300*l.* and 279*l.* 16*s.* 5*d.*, which form the subject of this action. On the same 3d of August, the plaintiffs wrote and sent from Genoa to the Hampshire Banking Company, a letter, whereof the following is a copy:—

“ *Genoa, 3d August, 1842.*

“ To the Hampshire Banking Company, Southampton.

“ Gentlemen,—We beg leave to confirm our last respects of 25th ultimo, and have now again to advise having valued on you for account of Mr. Henry Baker for 579*l.* 16*s.* 5*d.* sterling, as per note at foot, and which we doubt not will meet your kind protection, &c.

“ GRANTS, BALFOUR, & Co.

“ 300*l.* 0*s.* 0*d.* } 3d August, payable at three months' date, our
“ 279*l.* 16*s.* 5*d.* } order payable in London.”

On the 10th of August, 1842, Baker wrote and sent to the Hampshire Banking Company a letter enclosing a bill of exchange, drawn by Baker, upon and accepted by Messrs. King & Melville, for 2560*l.*, at four months, and payable to the order of Baker, and by him endorsed to the Hampshire Banking Company, which letter was in the words and figures following:—

“ *London, August 10th, 1842.*

“ Hampshire Banking Company, Southampton.

“ Dear Sirs,—Messrs. Grants, Balfour, & Co., unexpectedly to me, have drawn on you to 579*l.* 16*s.* 5*d.* This please to accept to the debit of my account. Please return me also the bill of lading of the *Flora*.

*47] *Inclosed is bill on King & Melville 2560*l.*, for the credit of my account.

“ HENRY BAKER.”

Baker was, at the time this letter was written, under liabilities to the banking company to a greater amount than the 2560*l.* bill. The cargo of the brig *Flora* (the bill of lading of which had been deposited with the company) was of a value far beyond 2560*l.* This bill of lading was delivered up to Baker, as he requested. Messrs. King & Melville stopped payment on the 23d of September, 1842; and their bill for 2560*l.* was dishonoured, and has not since been paid, though they have recommenced business, and have not been discharged as bankrupts or insolvents.

On the 11th of August, 1842, the Hampshire Banking Company, by Thomas Trew, the manager of the bank of the Hampshire Banking Company, wrote to Baker a letter, of which the following is a copy:—

“Hampshire Banking Company,

“Southampton, 11th August, 1842.

“Henry Baker, Esq., 79 Mark Lane.

“Dear Sir,—We beg to acknowledge the receipt of your favour of yesterday, enclosing bill on King & Melville, at four months, for 2560*l.*, for the credit of No. 3 account. Against this remittance we send you, as requested, B. L. of the *Flora*, upon which our advance is 2000*l.*, and will accept *Grants & Co.’s drafts for 579*l.* 16*s.* 5*d.**, leaving 19*l.* 16*s.* 5*d.* due on this transaction. We forward also a policy on the *Flora’s* cargo.

“THOMAS TREW, manager.”

The above letter of the 11th of August was received by Baker in London on the 12th, and was shown by him to Charles Balfour on the 13th.

On the 12th of August, Trew came to London, and about one o’clock in the afternoon of the same day, saw *Baker at his counting-house; and then, on the part of the banking company, informed Baker [48 that the bills (the subjects of this action) would not be accepted by the banking company, and that that countermanded the consent contained in the said letter of the 11th of August. Baker then assented to such countermand, and said he was glad of it. The said letter of the 11th of August had not, at this time, been communicated by Baker to Charles Balfour, or to the plaintiffs, or to any agent of the plaintiffs. Trew did not communicate upon this occasion with the plaintiffs; nor did Baker communicate to them what Trew had stated to him, but assured the plaintiffs that these bills would be honoured by the banking company; and subsequently handed Trew’s letter of the 11th of August to the plaintiffs.

On the 12th of August Baker stopped payment; and he afterwards became a bankrupt.

On the 12th of August the bills in question were presented to the Hampshire Banking Company by Messrs. King, Witt, and Co., the plaintiffs’ correspondents in Southampton, for formal acceptance, which the Hampshire Banking Company then declined to give.

On the 15th of August, 1842, Charles Balfour wrote and sent to the Hampshire Banking Company a letter, of which the following is a copy:—

“London, 15th August, 1842.

“Hampshire Banking Company, Southampton.

“Gentlemen,—I was surprised to hear from my friends that the drafts of my Genoa house upon you, for 300*l.* and 279*l.* 16*s.* 5*d.* for account of Mr. H. Baker, had not been accepted. Mr. Baker informed me that he had made you a remittance specifically against the above drafts; and that, in date of the 11th instant, (which letter Mr. Baker showed to me,) you assured him that these drafts would be accepted. I have, therefore,

*49] “requested Messrs. King, Witt, and Co. to present the above bills to you again, and have no doubt that every honour will be shown to them by return of post. C. BALFOUR.”

“P. S. It may be well to mention, for your regulation, that I am a partner in the house of Grants, Balfour, and Co.”

On the 16th of August, 1842, the bills were presented a second time to the Hampshire Banking Company, when, the manager being from home, the cashier declined to act, and promised that a letter should be sent to Balfour by that post. On the 17th of August, Balfour received from the Hampshire Banking Company a letter, whereof the following is a copy:—

“Hampshire Banking Company,

“Southampton, 16th August, 1842.

“Sir,—I have to acknowledge the receipt of your letter of the 15th instant, informing us of your having sent the drafts of Messrs. Grants, Balfour, & Co., for 300*l.* and 279*l.* 16*s.* 5*d.*, for acceptance a second time. As our manager, Mr. Trew, is from home, I cannot accept the bills: but, on his return, which will be on Thursday or Friday next, he shall communicate with you on the subject.

“FOR THOMAS TREW, manager,

“EDWARD ATKINS.”

On the 18th of August, Balfour received the following letter, written by Trew, the manager of the Hampshire Banking Company:—

“Hampshire Banking Company,

“Southampton, 17th August, 1842.

“Sir,—On my return to Southampton, this morning, I found your letter of the 15th instant, on the subject of the non-acceptance of the drafts of Messrs. Grants, Balfour, & Co., for 579*l.* 16*s.* 5*d.*, on account of Mr.

*50] “Henry Baker. The letter of the 11th instant was written in the belief that at that time all was right with Mr. Baker: whereas, before the drafts were presented for acceptance, and before the time for giving an answer concerning them had expired, I had ascertained that he was in difficulties, and had given him notice that the drafts would not be accepted; and he ought to have informed you. The engagement contained in the letter to Mr. Baker of the 11th instant having been im-

mediately cancelled, this company is under no engagement to your house, direct or implied: and, seeing that Mr. Baker is under considerable liabilities to the bank, I cannot consent to increasing them, however I may regret your loss on the occasion.

“THOMAS TREW, Manager.”

If the court shall be of opinion that the plaintiffs were entitled to recover in this action, then it is agreed that the verdict entered for the plaintiffs shall stand for the amount of the said two bills of exchange for 300*l.* and 279*l.* 16*s.* 5*d.*, with interest thereon respectively to the time at which final judgment could be signed. If the court shall be of opinion that the plaintiffs were not entitled to recover in this action, then it is agreed that a verdict shall be entered for the defendants. And it is further agreed that the court shall have the power of drawing any inferences from the above facts which the jury might have drawn, and of making any amendment which could have been made by the judge at nisi prius. It is also agreed that a copy of the pleadings may be referred to as part of the case.

The case was argued in Easter term last.

Manning, Serjt., (with whom was Sir *T. Wilde*, Serjt.) for the plaintiffs. The letter written and sent by the manager of the Hampshire Banking Company to Baker *on the 11th of August, 1842, amounted to an absolute promise to accept the bills mentioned in the pleadings, and operated as an actual acceptance thereof. There are many cases in the books to show that the acceptance of a foreign bill need not be upon the face of it, and that a mere promise to accept is sufficient; *Wilkinson v. Lutwidge*, 1 Stra. 648, 4 Bac. Abr. 711, 6th & 7th editions; *Lumley v. Palmer*, 2 Stra. 1000, 4 Bac. Abr. 711; *Car v. Coleman*, 4 Bac. Abr. 711; *Julian v. Shobrooke*, 2 Wils. 9, *Sproat v. Matthews*, 1 T. R. 182; *Anderson v. Heath*, 4 M. & Sel. 303; and indeed this is implied from the statutes 3 & 4 Ann. c. 9, s. 5, and 1 & 2 G. 4, c. 78, s. 2. Nor is it necessary that the promise to accept should be made to the party holding the bill; *Story on Bills*, 2d edit. p. 272, § 244; *Pillans v. Van Mierop*, 3 Burr. 1663; *Clarke v. Cock*, 4 East, 57; *Fairlie v. Herring*, 3 Bingh. 625, 11 J. B. Moore, 520. In *Pillans v. Van Mierop*, Lord Mansfield says: “If a man agrees ‘that he will do the formal part,’ the law looks upon it (in the case of an acceptance of a bill) as if *actually done*. This is an agreement ‘to accept the bill, if there was a necessity to accept it, and to pay it when due;’ and *they could not afterwards retract*. It would be very destructive to trade and to trust in commercial dealing if they could.” And *YATES, J.*, says: “This agreement ‘to honour their bill’ was a virtual acceptance of the bill. An acceptance need not be upon the bill itself; it may be by collateral writing: *Wilkinson v. Lutwidge*. A promise ‘to accept’ is the same as an actual acceptance. And a small matter amounts to an acceptance: and so says *Molloy*, lib. 2, c. 10, § 20.” It is clear, that, if the Hampshire Banking Company had

sent the bills back to Baker with their acceptance upon them, they could

•52] not have retracted *such acceptance, though it had not been communicated to the holder. In *Billing v. Devaux*, 3 M. & G. 565, 4 Scott, N. R. 175, one M., a merchant at Stockholm, on the 21st of August, 1830, drew upon the defendants, his correspondents in London, (amongst others,) a bill for 225*l.*, at eighteen days' date, payable to the plaintiff; the defendants, not being in funds, declined to accept this bill: on the 11th of September, the bill was presented for payment, and refused: on the 13th, M., the drawer, died insolvent: on the 15th, the defendants, in ignorance of the death or insolvency of M., wrote to him as follows: "Respecting your drafts on us, we have to advise that we have paid and are prepared to pay the following," enumerating several bills, including the one in question; and in a postscript they wrote, "We have just been informed that the holders of the bill above for 225*l.* had returned it to you: this they had no right to do, as we have already explained to you they were bound to keep it till the following post-day: the said bill, we are almost sure, was presented again on Saturday last; therefore we cannot conceive how it can have been sent back before this day: you ought to require proof that this bill has been returned by Friday's mail, otherwise the charges made thereon cannot be demanded of you." It was held that the above letter constituted a valid acceptance of the bill, there being nothing in the postscripts to destroy the effect of the former part of the letter. Besides, there is here an express consideration for the acceptance. Baker's letter of the 10th of August, 1842, advising the Hampshire Banking Company of the bills in question having been drawn upon them on his account, encloses a remittance; and the manager, in answer, acknowledges the receipt of the remittance, (as to the value of which the court will not inquire,) and expressly promises to

•53] accept the drafts. Trew's letter of the 17th of August, addressed *to Balfour, is also important, as showing *quo animo* the letter of the 11th was written.

Channell, Serjt., (with whom was *Montague Smith*,) for the defendants. It may be admitted that, in the case of a foreign bill, the acceptance need not be on the face of it, and that the fact of the acceptance need not be communicated to the holder of the bill. The cases are too distinct and too numerous to be now questioned. But it is necessary that that which is relied on as an acceptance should be communicated to some one who is party to the bill, or at least to an agent of some party. None of the authorities warrant the plaintiffs in contending that the letter of the 11th of August, from Trew to Baker, who was no party to the bills, nor, as far as appears on the face of the case, agent to any party to them, amounted to an acceptance. What are the facts? On the 3d of August, 1842, Grants, Balfour & Co., the plaintiffs, advised the defendants, the Hampshire Banking Company, of their having drawn the bills in question upon them. On the 11th, Trew, the manager, wrote the letter which is

alleged to be the acceptance. That letter was addressed to Baker, and was received by him in London on the 12th. On the same day Trew came to London, and informed Baker that the bills would not be accepted, the letter of the 11th not having then been communicated to the plaintiffs, or to any agent of the plaintiffs. Baker assented to the countermand, and on the 13th communicated to Balfour, one of the plaintiffs, Trew's letter of the 11th, but did not apprise him that that letter had been recalled. That an actual acceptance may be countermanded or cancelled before it is communicated to the drawer, or any other party to the bill, is clear; *Cox v. Troy*, 5 B. & Ald. 474, 1 D. & R. 38. BAYLEY, J., there says: "I have no difficulty in saying, from principles of [*54 common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor; for, the making a communication is a pledge by him to the party, and enables the holder to act upon it. But, while it remains in the drawee's hands, it seems to me, the acceptance is not fully binding on the person who signed it, and he is at liberty to say, before he parts with it, 'I have not yet entered into an engagement to accept.'" The same rule must apply to an acceptance other than on the face of the bill. The passage cited from Story on Bills does not affect this position. In *Clarke v. Cock*, 4 East, 57, the statement was made to the holder of the bill; and, as Lord ELLENBOROUGH says, "induced a credit without which the plaintiffs would not have given value for the bills." And he adds: "The defendant has thereby enabled another with truth to assert, and furnished him with the means of proving that assertion by the production of the defendant's letter, that he had undertaken to accept the bills, which, in ordinary mercantile understanding, amounts to an acceptance; and by that, credit was attached to the bills." In *Wynne v. Raikes*, 5 East, 514, the letter which constituted the acceptance was addressed to the drawer of the bill. In *Fairlie v. Herring*, 3 Bingh. 625, 11 J. B. Moore, 520, the promise was made to a party to the bill; and that is a circumstance that is relied on by BEST, C. J., in his judgment. So, in *Pillans v. Van Mierop*, 3 Burr. 1663, the communication was to persons who were to stand as parties to the bills. Again, in *Billing v. Devaux*, 3 M. & G. 565, 4 Scott, N. R. 175, the letter containing the acceptance was communicated by the administrator of Morsing, the drawer, to the plaintiff. *Trew's letter of the 17th of August merely assigns the reasons of [*55 the company for rescinding the agreement to accept. Then, as to the alleged consideration. [TINDAL, C. J. That could only operate as between Baker and the defendants. CRESSWELL, J. The only use of the consideration is this, to explain the terms used by the defendants in their letter of acceptance. Further than that, it can have no operation between these parties.]

Manning, Serjt., in reply. The position contended for on the part of the defendants, is not sanctioned by any of the cases. In *Wynne v*

Raikes, 5 East, 521, Lord ELLENBOROUGH says: "The second question in this case is, whether, inasmuch as the bill was not taken by the holders upon the credit of this promise of the defendants so made to the drawers, nor was the same known to them to have been made at all till after the bill was due, they, the holders, can avail themselves of it as an acceptance. In the case of *Powell v. Monnier*, 1 Atk. 611, already mentioned, that which was holden an acceptance enuring to the benefit of the endorsees, the plaintiffs, was an acceptance contained in a letter to the drawer, one Newburgh, promising 'that his bill should be duly honoured.' The promise in that case, being long subsequent to the time when the plaintiffs became possessed of the bill by endorsement, could, of course, have formed no part of their original inducement to take it. And the promise was, in that case, as well as in this, made to a drawer who had drawn without having any effects in the acceptor's hands; and it does not appear in the one case more than in the other, that the holders, the plaintiffs, ever knew of the acceptance on which they afterwards relied prior to the time when the bill became due. Without oversetting

*56] the *authority of the case of *Powell v. Monnier*, we cannot say that the plaintiffs are not in the present case, which so entirely resembles it, entitled to recover. And as, in adhering to it, we violate no principles of commercial convenience, but confirm a rule of law which we find established on a subject which least of all others endures uncertainty and change, we cannot do otherwise than hold the plaintiffs in this case entitled to recover." Possibly, in the present case, Balfour might have stopped the corn in transitu, had he not been put at rest by Trew's letter of the 11th of August. [CRESSWELL, J. Do you find any case where the promise has been made to any but one who either was or had been the holder, or the agent of a holder of the bill?] There is no case in which that distinctly appears. [CRESSWELL, J., referred to *Doe dem. Garmons v. Knight*, 5 B. & C. 671, 8 D. & R. 348.] It is quite unnecessary to discuss that here; for the case distinctly discloses agency on the part of Baker. Baker was the person who had ordered the cargo of the plaintiffs. Instead of pursuing the usual course of drawing the bills himself upon the Hampshire Banking Company, payable to Grants, Balfour, & Co., Baker intimates to them the parties on whom they are to draw for payment of the invoice price of the cargo. The case states two former transactions in which the same course was adopted. And Baker afterwards recognises the drafts as having been made on his account. How, then, can it be said that he is a stranger to the transaction?

[At the suggestion of the court, the special case was afterwards amended by the insertion of the words within brackets in pp. 45 and 46.]

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. This case was

*57] argued in last Easter term, before *my brothers COLTMAN, ERSKINE, and CRESSWELL, and myself. It was an action by the plain-

tiffs, as drawers, against the Hampshire Banking Company, as acceptors, of two bills of exchange drawn at Genoa. The defendants pleaded that they did not accept. At the trial before me a verdict was taken for the plaintiffs, subject to the opinion of the court upon a case, which stated that the plaintiffs, having made purchases at Genoa for one Baker, a corn-merchant in London, drew the bills in question on the defendants for a part of the purchase money, that being the mode in which they had, by Baker's directions, obtained payment for goods bought for him on other occasions. The plaintiffs sent to the defendants a letter bearing date, at Genoa, the 3d of August, 1842, in which they stated that "they had *valued on them*, for account of Mr. Henry Baker, for 579*l.* 16*s.* 5*d.* sterling, as per note at foot, and which they doubted not would meet their kind protection." On the 10th of August, 1842, Baker (who had a banking account with the defendants) wrote to them as follows: "Messrs. Grants, Balfour & Co., unexpectedly to me, have drawn on you to 579*l.* 16*s.* 5*d.* This please accept to the debit of my account. Please return me also the bill of lading of the *Flora*. Enclosed is bill on King & Melvill for 2560*l.*, for the credit of my account." And on the following day, Trew, the manager of the bank, wrote in answer, "We beg to acknowledge the receipt of your favour of yesterday, enclosing bill on King and Melvill, at four months, 2560*l.*, for the credit of No. 3 account. Against this remittance we send you, as requested, B. L. of *Flora*, upon which our advance is 2000*l.*, and *will accept Grants & Co.'s drafts for 579l. 16s. 5d.*, leaving 19*l.* 16*s.* 5*d.* due on this transaction." This letter was received by Baker on the 12th of August, and was shown by him to Balfour (one of the plaintiffs) on the 13th. On the 12th of August, at *about one o'clock in the afternoon, and after the receipt of the letter written the day before, Trew, the manager of the bank, saw Baker, and on the part of the defendants informed him that the bills would not be accepted, and that they countermanded the consent given in the letter of the 11th, to which Baker assented, but, notwithstanding, afterwards communicated the letter of the 11th, and not the countermand, to Balfour. [*58]

On the argument before us it was not disputed by the counsel for the defendant that a foreign bill of exchange may be accepted verbally, or by writing not on the face of the bill, or that a promise to accept or pay has the effect of an acceptance; nor was it disputed that such acceptance may be given to the drawer or any other party to the bill, after it has been endorsed away, or even after it has become due; *Powell v. Monnier*, 1 Atk. 611, and *Wynne v. Raikes*, 5 East, 514, being distinct authorities to that effect. But it was contended that such promise to accept or pay, not being on the face of the bill, must, in order to bind the party making it, be communicated to some party to the bill, or to the holder, or to some agent for such party or holder; and that in this case, no such communication was made to Balfour until after the manager of the bank had

withdrawn the promise to accept, with the assent of the party to whom that promise had been given. On the other hand, it was contended that Baker was not a stranger to the bills, but a person who, having adopted the act of the drawers, was in the same position as if he had drawn them himself: and, it having been suggested that the bills were drawn in pursuance of authority previously given, the case stood over, in order that, if such were the fact, it might be stated accordingly. Since the end of last term the special case has been amended, and it now appears that a

*59] Mr. *Magnus (acting under a general authority from Baker) directed the plaintiffs to purchase the corn for the price of which the bills were drawn, and also that the bills were drawn by the direction of Magnus, acting as agent for Baker.(a) The promise to accept was therefore given to the party by whose direction and on whose account the bills were drawn: and in *Fairlie v. Herring* it was held that such a promise, given by the drawee to the party by whose direction a bill was drawn, operated as an acceptance, and enured to the benefit of the endorsee, to whom the bill had been previously endorsed. In the present case it appears to us, that, when Baker, by whose directions and for whose account the bills were drawn, obtained from the defendants the written promise to accept, that amounted to an acceptance, and enured to the benefit of the drawers; and that Baker could not afterwards cancel that acceptance, or release the defendants from their engagement, by consenting to the countermand, as it is called, by Trew, on the 12th of August.

We are, therefore, of opinion that the issue on the acceptance was properly found for the plaintiffs, and that the *postea* must be delivered to them.

Postea to the plaintiffs.

a) The effect of the amendment (*supra*, 45, 46) seems to have been, to show distinctly that Baker originally authorized the plaintiffs to draw the two bills in question upon the company; whereas, in the absence of such amendment, it might be open to the defendants to contend that a contemporaneously existing authority was not distinctly shown. Still, as Baker, by his letter of 10th August, *anté*, 46, adopted the act of the plaintiffs in drawing upon the company, which act was done *professedly* on account of Baker, (see *Wilson v. Tupper*, 6 M. & G. 236,) it would rather appear that the ratification would have been sufficient, though no contemporaneously existing authority had been shown.

*60] *The Wardens and Commonalty of the Mistery of FISHMONGERS
of the City of LONDON v. ROBERTSON and Others.

In assumpsit upon articles of agreement, and a memorandum of the same date, endorsed thereon, varying the terms, the consideration for the defendants' promise was alleged to be the making of the articles and memorandum, and the undertaking by the plaintiffs that they would perform every thing in the articles and memorandum contained on their part to be performed. To prove the promise, and that it was made upon the consideration alleged, the plaintiffs offered in evidence the part of the articles in their custody, signed by the defendants, with the memorandum on the back thereof, signed by the clerk of the company, and by the agent

of the defendants. Both these were duly stamped; but the signatures of some of the defendants to the articles being attested by a witness whose absence was not accounted for, it was objected that the articles were not admissible; and they were accordingly rejected. The plaintiffs then called for the part of the articles and memorandum which was in the possession of the defendants, as well to prove the consideration stated in the declaration as to meet the above objection. The articles were stamped, but the memorandum was *not*; on which ground it was objected to on the part of the defendants, and rejected:—
Scable, that the evidence was properly rejected.

ASSUMPSIT upon articles of agreement (not under seal) entered into by the clerk of the Fishmongers' Company, on their behalf, with the defendants.

The first count of the declaration stated that before and at the time of the making and entering into the articles of agreement in that count mentioned and set forth, a petition had been presented to the House of Commons, and was then pending, at the instance and on behalf of the defendants, for leave to bring into the House of Commons a bill for draining, embanking, and reclaiming certain slob or waste lands in Lough Swilly and Lough Foyle, in the counties of Donegal and Londonderry, in Ireland: that the plaintiffs, before and until and at the time of the making of the said articles, had opposed and were then opposing and objected to the bringing in and passing of such bill: that one Robert Ogilby at those times also objected to and opposed the introduction of the same bill, separately and **apart from the plaintiffs and on his own behalf*: [*61 that, on the 17th of March, 1838, by certain articles of agreement in writing then made and entered into by and between T. D. Towse, for and on behalf of the plaintiffs, of the first part; T. G. Kensit, for and on behalf of Ogilby, of the second part; and the defendants of the third part; after reciting that a petition had then lately been presented to the House of Commons, at the instance and on behalf of the defendants, for leave to bring in a bill for draining, embanking, and reclaiming the slob or waste land in Lough Swilly and Lough Foyle, in the said counties of Donegal and Londonderry, (being the petition thereinbefore mentioned,) and that certain proceedings had been thereupon had, and that the plaintiffs and Ogilby were then respectively seised, possessed of, or otherwise entitled to, certain lands abutting upon or adjacent to certain parts of the said slob or waste land in Lough Foyle aforesaid, and in respect of such land then were, or claimed to be, entitled to the said slob or waste land adjacent thereto, and to certain rights and privileges in, over, and upon the same; and also reciting that the plaintiffs and Ogilby then objected to the said intended bill, and the powers and authorities thereby sought to be obtained, as injurious to their said respective rights, and had, by their agents, opposed the proceedings necessary for the introduction thereof into parliament (being the said opposition by the plaintiffs and Ogilby respectively thereinbefore mentioned,) it was, by the said articles, for the purpose of preventing the expense of further opposition to the said intended bill, and for settling and adjusting the rights of the plaintiffs and Ogilby respectively to the said slob or waste land so sought to be reclaimed, mutually agreed by and between the said parties to the

said agreement, and they did thereby mutually agree, each with the
 *62] others and other of them, in manner *following, that is to say, that
 the plaintiffs and Ogilby should respectively withdraw all opposition to the further progress of the bill to be brought into parliament and promoted by the defendants, for draining, embanking, and reclaiming the said slob or waste land in Lough Foyle aforesaid; that the several powers and authorities to be granted by the said bill, and the several clauses, provisos, and restrictions and stipulations therein to be contained, should be agreed upon and settled by and between the solicitors of the said parties to the said agreement, before any proceedings should take place thereupon in committee of either house of parliament, to the intent, and with the object, that the said bill might be as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as it could be made; and that, if, in framing and perfecting the said bill, any difference or dispute should arise between the said parties, or any of them, in regard to any clause, matter, or thing which any of the said parties might desire to insert or to have omitted in the said bill, such difference or dispute should be referred forthwith to Mr. Brodie, for his opinion and determination, which should be final and conclusive on the said parties; that the plaintiffs and Ogilby respectively should, by petition or otherwise, at the expense of the defendants, use all reasonable means and endeavours to promote the progress of the said bill, and procure an act of parliament to pass thereupon; that such part of the said slob or waste land as was opposite to the plaintiffs' estate, bounded by the canal on the one side and by Mr. Maxwell's property on the other, and extending to the site of the proposed embankment, as laid down in Mr. McNeill's plan, should be allotted and given to the plaintiffs; that a proportion equal to one-tenth part of the whole of the slob or waste land, opposite to the frontage of the lands of Ogilby, which
 *63] should be *reclaimed under the powers of the intended act, should be allotted and given to Ogilby, such proportion of the said slob or waste land to be part of the slob opposite such frontage as aforesaid, and to be selected by Ogilby and the defendants, with due regard to the convenience and interest of Ogilby, so far as the same could be accomplished consistently with an arrangement for the cession of further portions of the said slob, entered into by the defendant Dimsdale, with certain other persons, it being understood that such arrangement was not to affect or prejudice any right of Ogilby; that such respective allotments or proportions should be absolutely reserved in the said intended act, to the plaintiffs and their successors, and to Ogilby and his heirs, respectively, free and indemnified of, and from, and against all costs, charges, and expenses attending the embanking, draining, and reclaiming of the said slob, or any other charge, stipulation, restriction, or condition whatsoever: and the defendants did also, in and by the said articles, undertake and agree that they would, on the passing of the said intended act,

pay to the plaintiffs the sum of 1000*l.*, and that the defendants should and would pay all costs and expenses of, and attendant upon, the application for and obtaining the said act: and, lastly, it was in and by the said articles agreed, by and on the part of the plaintiffs and the said Ogilby, that the aforesaid proportions or allotments of the said slob or waste land, when reclaimed, which should be allotted to them respectively as aforesaid, should be received and taken by them respectively, in full of all rights and claims of the plaintiffs and Ogilby respectively, or any of their respective tenants claiming from or under them or him, in respect of the said slob or waste land, and that the plaintiffs and Ogilby respectively would protect and indemnify the defendants from and against any right or claim derived from and under the plaintiffs and Ogilby *respec- [*64
tively, which should or might be made by any of their said tenants respectively in, to, or upon the said slob or waste land, or any part thereof, except as to any contract or engagement which might have been theretofore entered into by the defendants, or any of them, with the said tenants respectively, or any of them in respect thereof: that, after the making of the said articles, to wit, on the said 17th of March, 1838, by a certain memorandum then endorsed on the said articles of agreement, by and with the consent and approbation of all the said parties to the said articles, and then signed by one J. M. Pearce as the solicitor and agent of the defendants, it was and is declared to be understood between the said parties to the said articles of agreement, that the plaintiffs and the said Ogilby were only severally, and not jointly, held and bound for the fulfilment of the said agreement on their own respective parts, but not for each other; and that the sum of 1000*l.*, so in the said articles mentioned to be paid to the plaintiffs, was for certain costs and expenses which they the plaintiffs had been put to during the then present year, partly in a certain survey made by Mr. McNeil, and for his plans and valuations; which surveys, plans, and valuations the defendants were to have the benefit of, but that they were to be forthwith returned to the plaintiffs if the said sum of 1000*l.* should not be duly paid as mentioned in the said articles; and it was also thereby agreed that the said agreement for withdrawing the opposition and facilitating the bill, as in the said articles mentioned, should only be and remain in force for the then present session of parliament, 1837—1838. Averment: that the said articles of agreement, and the said memorandum so endorsed thereon as aforesaid, having been so made as aforesaid, afterwards, to wit, on the said 17th of March, in the year last aforesaid, in consideration thereof, and of the premises *aforesaid, and [*65
in consideration that the plaintiffs *would* then observe, perform, fulfil, and keep all things in the said articles and memorandum contained on their part and behalf to be observed, &c., the defendants promised the plaintiffs that they, the defendants, would observe, &c., all things in the said articles and memorandum contained, on their part and behalf to be observed, &c., so far as concerned the interest of the plaintiffs:

that the plaintiffs, on the faith of, and in pursuance of, the terms of the said articles and memorandum, afterwards, to wit, &c., delivered to the defendants the surveys, plans, and valuation in the memorandum mentioned, being of the value of 1000*l.*; that the plaintiff's opposition to the bill was withdrawn; that the bill was brought into parliament; that its provisions were discussed between the parties; that differences arose between them, which were referred to Mr. Brodie, by whom the bill was settled; that the plaintiffs used all reasonable means and endeavours to promote the bill, withdrew their opposition to its progress, and presented a petition in its favour; that Ogilby also withdrew his opposition to the bill, and used all reasonable means and endeavours to promote its progress; that the plaintiffs incurred costs, at the request of the defendants, to the amount of 1200*l.*; that the bill passed, with divers alterations not assented to by the plaintiffs, or referred to Mr. Brodie; and that the plaintiffs and Ogilby had been at all times ready and willing to receive their respective allotments, and to indemnify the defendants from claims by tenants, &c., as in the articles of agreement mentioned. The declaration then assigned for breaches, first, the insertion by the defendants in the bill, of divers powers and authorities, and divers clauses, provisoes, restrictions, and stipulations, not agreed upon and submitted to Mr. Brodie; secondly, that such last-mentioned powers and authorities, &c., were not in *accordance with, but contrary to, the true
*66] intent and meaning of the agreement, whereby the plaintiffs were deprived of the stipulated reservation of the reclaimed waste; thirdly, non-payment of the 1000*l.* as agreed; fourthly, not returning the survey, plans, and valuation; fifthly, non-payment of the costs incurred by the plaintiffs.

The declaration also contained a count upon an account stated.

The defendants, who severed in pleading, pleaded various pleas, to some of which, or to the subsequent pleadings, the plaintiffs demurred, and obtained judgment or leave to amend.(a)

The only pleas that ultimately became material upon the present occasion were—non assumpsit, and a plea that the promise of the defendants in the first count mentioned was not made for the consideration in the same count mentioned, and there was not any good or valuable consideration whatsoever for the making of the promise in the said first count mentioned. The plaintiffs joined issue upon the former and traversed the latter of these pleas; upon which traverse issue was joined.

The cause was tried before TINDAL, C. J., at the sittings in London after last Easter term. In order to prove the affirmative of the two issues above mentioned, the plaintiffs called upon the defendants to produce (on notice) the part of the agreement and memorandum in their possession. They were accordingly produced, both being signed by Towse, on behalf of the Fishmongers' Company, and by Kensit, on behalf of Ogilby. The agreement was stamped; but the memorandum endorsed

(a) See 5 Mann. & Gr. 131, 6 Scott, N. R. 56, 112, 117.

thereon was not stamped; whereupon it was objected on the part of the defendants that the last-mentioned *document was inadmissible. [°67 On the part of the plaintiffs it was submitted that the whole, substantially, constituted but one agreement, and was therefore covered by the stamp upon the face of it: it was also insisted that it did not appear that the subject of the agreement, *at the time of its execution*, was of the value of 20*l.*, the value depending upon the contingency of the bill passing. His lordship, however, thought otherwise.

The plaintiffs then tendered in evidence the part of the agreement which was in their own possession, and which was signed by the seven defendants, with the memorandum on the back signed, by Towse, on behalf of the plaintiffs, by Kensit, as the agent of Ogilby, and by Pearce, “as solicitor to the within-named parties of the third part.” The agreement and memorandum were both stamped: but the signature to the agreement by the several defendants being attested by different witnesses, and the witness who attested the signatures of three of the defendants, viz. Booth, Stedman, and Edge, not being called, and his absence not being accounted for, it was objected on behalf of the defendants that this part of the agreement could not be read. On the part of the plaintiffs it was insisted, (assuming Pearce to have been duly constituted the agent of all the defendants, which the Lord Chief Justice thought sufficiently established,) that the signature of the memorandum by him dispensed with proof of the due execution of the agreement; and *Utterton v. Robins*, 1 A. d. & E. 423, was cited.

It was further insisted on behalf of the defendants, that the consideration for the agreement on their part was not proved, inasmuch as it did not appear that the agreement was executed by the company under their common seal, or that Towse, their agent, was authorized under seal to execute it for them; and that the subsequent *ratification by deed- [°68 poll under the corporate seal (which was stated in the replication to one of the pleas, but which was after the alleged breach) could not avail: *Saunderson v. Griffiths*, 5 B. & C. 909, 8 D. & R. 643.

The learned judge ruled that the objection to the reception of the articles produced from the plaintiffs’ custody, and of the memorandum produced from that of the defendants, was valid, and declined to receive them: and, the jury having, at the request of his lordship, assessed the damages the plaintiffs had sustained by the breach of the agreement, at 1*s.*, the learned judge directed a verdict to be entered for the defendants on the two issues above mentioned, with liberty to the plaintiffs to move to enter the verdict for 1*s.*, if the court should be of opinion that the articles, or the memorandum, had been improperly rejected.

The plaintiffs’ counsel insisted, that, upon the true construction of the articles and memorandum, they were entitled to a verdict for the 1000*l.* as liquidated damages; but in this view of the case the learned judge did not acquiesce.

Channell, Serjt., in Easter term last, accordingly obtained a rule nisi to enter a verdict for the plaintiffs for 1s., or for 1000*l.*, or for a new trial. He cited *Nash v. Turner*, 1 Esp. N. P. C. 217, *Bringlee v. Goodson*, 5 N. C. 738, 8 Scott, 71, and *Utterton v. Robins*, 1 Ad. & E. 423, to show, that, inasmuch as the memorandum endorsed on the articles admitted the due execution of the agreement, the plaintiffs were not bound to prove it in the ordinary way; and also *Smartle d. Newport v. Williams*, 1 Salk. 280, and *Bradshaw v. Bennett*, 1 M. & Rob. 143, to *69] show that the plaintiffs were relieved from the necessity of proving the execution of the articles and memorandum produced on notice by the defendants, inasmuch as the latter claimed an interest under them. He further submitted that no stamp was necessary upon the memorandum, the articles which it referred to and incorporated being duly stamped: for this he cited *Peate v. Dicken*, 1 C., M. & R. 422, 5 Tyrwh. 116, 3 Dowl. P. C. 171. And as to entering a verdict for 1000*l.*, he insisted that, the declaration assigning for breach the non-payment of that sum, and there being no plea alleging payment thereof, the plaintiffs were entitled to a verdict for the 1000*l.* as stipulated damages.

Talfourd, Serjt., (with whom was *J. W. Smith*,) showed cause on behalf of the defendant Dimsdale. He submitted—first, that the signing of the memorandum by Pearce, assuming him to have been duly authorized to sign it for all the defendants, did not dispense with the necessity of calling the subscribing witness to prove the execution of the agreement; *Call v. Dunning*, 5 Esp. N. P. C. 16, 4 East, 53, *Abbot v. Plumble*, 1 Dougl. 215; the admission not being made for the purpose of the cause, and the agreement not being set up by the defendants as parties claiming an interest under it—secondly, that inasmuch as the memorandum materially varied the terms of the agreement, the former required a stamp; *Reed v. Deere*, 7 B. & C. 261, 2 C. & P. 624.

Murphy, Serjt., for the defendant Robertson, as to the necessity of calling the subscribing witness, referred to Stark. Evid. 2d edit. p. 371; *The King v. The Inhabitants of Harringworth*, 4 M. & Selw. 350; the observation of BAYLEY, on *Smartle d. Newport v. Williams*, in *Tinkler v. Walpole*, 14 East, 230; Bacon's Abridgment, *Evidence* (F.); *Slatterie* *70] *v. Pooley*, 6 M. & W. 664; (a) *Williams v. Sells*, 2 Campb. 519; *Gillett v. Abbott*, 7 Ad. & E. 783, 3 N. & P. 24; *Collins v. Bayntun*, 1 Q. B. 117, 4 P. & D. 534.

As to the stamp, he cited *Reed v. Deere*, 7 B. & C. 261.

Byles, Serjt., for the defendant Staines, also submitted that the case was not within any exception to the rule which requires proof of a written instrument by calling the attesting witness; citing *Hawkins v. Sherman*, 3 C. & P. 459; Comyn's Digest, *Fait* (A. 2.); Litt. § 374; Co. Litt. 231 a: and that there was no consideration for the promise alleged in the declaration; *Saunderson v. Griffiths*, 5 B. & C. 909, 8 D. & R. 643

(a) And see *Bethell v. Blencowe*, 3 M. & G. 119; *Howard v. Smith*, Ib. 254.

Hindmarch, for the defendant Whiskin, submitted, first, that the plaintiffs had failed in proving the consideration upon which the alleged promise of the defendants was founded; secondly, that the plaintiffs were bound to call the attesting witness—citing *Doe dem. Sykes v. Durnford*, 2 M. & Selw. 62; *Cunliffe v. Sefton*, 2 East, 183; *Barnes v. Trompowsky*, 7 T. R. 265; and *Gordon v. Secretan*, 8 East, 548; thirdly, that the signature of the memorandum by Pearce did not amount to an admission of the execution of the agreement so as to dispense with proof thereof in the ordinary way; fourthly, that the memorandum required a stamp, *Ramsbottom v. Mortly*, 2 M. & Selw. 445; fifthly, that, assuming the agreement and memorandum to have been both properly in evidence, they did not sustain the promise alleged in the declaration, which was a promise founded upon an executory consideration only—Com. Dig., *Action upon the Case* (F 6.); *Rampston* and **Bowler's* case, [71] 3 Leon. 98; 1 Stark. Evid. 2d edit. p. 405; *Hopkins v. Logan*, 5 M. & W. 241; *Antram v. Chace*, 15 East, 209; *Dilley v. Pollhill*, 2 Str. 923; *Ferrer v. Owen*, 7 B. & C. 427, 1 Mann. & R. 222; *Biddell v. Dowse*, 6 B. & C. 255, 9 D. & R. 404.

Channell, Serjt., (with whom was *Bovil*.) in support of the rule. The plaintiffs were entitled to treat the memorandum as a new contract, incorporating, by reference, the original agreement; and therefore formal proof was dispensed with, more especially as the defendants took an interest under it; *Nash v. Turner*, 1 Esp. N. P. C. 217; *Bringloe v. Goodson*, 5 N. C. 738, 8 Scott, 71; *Bradshaw v. Bennett*, 1 M. & Rob. 143; *Utterton v. Robins*, 1 Ad. & E. 423; *Bell v. Chaytor*, 1 Car. & K. 162; *Doe dem. Tyndale v. Heming*, 6 B. & C. 28, 9 D. & R. 15. He further insisted that the memorandum did not require a new stamp, its object being merely to carry into effect the substantial intentions of the parties as imperfectly expressed in the original agreement; *Peate v. Dicken*, 1 C., M. & R. 422, 5 Tyrwh. 116, 3 Dowl. P. C. 171; and that the 1000*l.* mentioned in the articles and memorandum was not a penalty, but liquidated damages, the defendants having contracted to pay that specific sum for a specific object. [As to this latter point it was insisted for the defendants that no leave was reserved to the plaintiffs to move to enter the verdict for 1000*l.*, and that had it been asked at the trial the defendants would not have assented to such a reservation.]

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. This cause went down to trial upon the several *questions of fact raised by [72] the pleadings on the part of the respective defendants, amongst which one issue was upon the plea of non assumpsit, and another upon a plea denying that the promise was made upon the consideration alleged in the special count. The consideration of that promise was stated to be the making of the articles of agreement on the 17th of March, 1838, and the memorandum endorsed thereon of the same date, and the under-

taking by the plaintiffs that they would perform every thing in the articles and memorandum contained on their part and behalf to be performed. And, as the whole question before us turns upon the evidence offered as to those issues, and the finding of the jury thereon, it will be unnecessary to advert to any other questions raised on the record.

The plaintiffs in order to prove the affirmative of the two issues above referred to, first tendered in evidence the part of the agreement of the 17th of March, 1838, which was in their own possession, and was signed by the seven defendants, and which had also the memorandum on the back, signed by Towse, the clerk of the Fishmongers' Company, by Kensit, the agent of Ogilby, and by Pearce, "as solicitor to the within-named parties of the third part." Both the articles and memorandum so tendered in evidence were stamped: but, as it appeared that the signature of the articles by the several defendants was attested by different witnesses, and the witness who attested the signature by the defendants Booth, Stedman, and Edge was not produced, and his absence was not accounted for, the objection was taken that *that* part of the agreement could not be received in evidence.

The plaintiffs then called for the part of the same articles and memorandum which was in the possession of the defendants, as well for the purpose of proving the consideration stated in the declaration, as also *73] for the "purpose of meeting the objection raised against the admissibility of the former part of the agreement. The defendants accordingly produced the part in their possession, such part of the articles being signed by Towse, on behalf of the Fishmongers' Company, and by Kensit, on behalf of Ogilby, the parties to the articles of the first and second part, and memorandum being signed by the same parties, Towse and Kensit. But, with respect to this part of the articles and memorandum, it appeared, that, although the articles *were* stamped, the memorandum was *not*. The objection, therefore, taken against the admissibility of this document was, that the memorandum had no stamp.

After argument at the trial, the Chief Justice held the objection to be valid; and the verdict upon these two issues was thereupon found for the defendants, with liberty to the plaintiffs to move to enter the verdict for themselves if the court should think the rejection of this evidence was wrong: and, at the same time, the Chief Justice requested the jury (with the consent of the parties) to find what damages the plaintiffs would have sustained by the breach of this agreement, supposing the plaintiffs entitled to recover; when the jury found the sum of *one shilling* only. But, as the plaintiffs contend they are entitled, upon the proper construction of the agreement, to the sum of 1000*l.* as damages ascertained by the articles of agreement and memorandum, the cause must, in any point of view, go down to a new trial; for, the defendants insist that there was no understanding on their part that the rule should empower the court to enter any verdict for the plaintiffs except for the

nominal damages of *one shilling*; and that they should never have assented to such a construction of the agreement as that the 1000*l.* was the stipulated amount of the damages between the parties, *but, on the contrary, would have tendered a bill of exceptions to such direction, if any such had been given. [*74]

The only question, therefore, is, upon what terms the new trial should be had. If the cause went to a new trial simply on the ground of the improper rejection of evidence, the plaintiffs would undoubtedly have been entitled to such new trial without payment of costs; but the plaintiffs have a further object in obtaining a new trial, namely, the object of increasing the damages beyond the nominal sum at which the jury have assessed them: and, even supposing the verdict to have been properly found for the defendants, the plaintiffs would still ask for a new trial, in order that they might remove the difficulty which had occurred on the former occasion, by procuring the proper stamp on the memorandum, and by accounting for the absence of the attesting witness.

We do not, therefore, feel ourselves called upon to give any opinion upon the points which have been argued before us, which, so far as can be foreseen, will not occur on the second occasion, or, if they should occur, may be made the ground of a bill of exceptions: and, looking at the case as one in which the new trial is granted substantially for the benefit of the plaintiffs, to enable them to increase the damages, we think the justice of the case requires that there should be a new trial on payment of costs by the plaintiffs. Rule absolute accordingly.

*PONTIFEX and Another v. WILKINSON.

[*75]

The plaintiffs declared in assumpsit upon a contract, by which they were to manufacture and fix complete for the defendant a certain copper, &c. necessary for the fitting up of a brew-house, according to a specification, for a certain price, and the defendant was to permit the plaintiffs to put up the work and pay for the same on the delivery and fixing up thereof; assigning as a breach that the defendant would not permit the plaintiffs further to proceed with, and to complete the work, but discharged them therefrom. Upon the trial of an issue on the readiness of the plaintiffs to manufacture and complete the copper, &c., it was left to the jury to say, upon the evidence, which party was in fault in occasioning the contract not to be carried into effect:—*Held*, no misdirection.

ASSUMPSIT. The first count in the declaration stated, that on the 7th of July, 1842, in consideration that the plaintiffs, at the request of the defendant, had then agreed with, and promised, the defendant to manufacture and make of the best materials and best workmanship, and fix complete, exclusive of any bricklayers' and carpenters' work, for him certain goods and chattels named and specified in a certain specification or estimate, that is to say, &c., [setting out a special contract for the fittings up and utensils necessary for a brewhouse,] at and for a certain price or sum, to wit, the sum of 535*l.* 10*s.*, and to deliver the same to him, and fix the same for him, when completed as aforesaid, the defend-

ant promised the plaintiffs to permit and suffer them to perform and complete the said work on the terms aforesaid, and also to accept the said goods and chattels of the plaintiffs when so manufactured, made, and fixed as aforesaid, and pay for the same the price aforesaid on the delivering and fixing thereof: Averment, that, although the plaintiffs, confiding in the said promise of the defendant, did afterwards, on the day and year aforesaid, commence, and in part manufacture the said goods and chattels on the terms aforesaid, and had always been ready and willing, and still were ready and willing, to manufacture and complete the whole of the said goods and chattels, and fix the *same
 *76] when completed, upon the said terms; whereof the defendant, on &c., last aforesaid, had notice; yet the defendant, on, &c., last aforesaid, did not nor would not suffer or permit the plaintiffs further to proceed with, or complete, the manufacture of the said goods and chattels, but, on the contrary, wholly refused so to do, and afterwards, on, &c., last aforesaid, wrongfully and absolutely discharged the plaintiffs from proceeding with and completing the manufacture of the residue thereof; by means whereof they, the plaintiffs, had lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to them from the completion and fixing of the said goods and chattels; and the price and value of the work by them so done, and of the work to be by them completed, were unpaid and unsatisfied, and the said part-completed works had become and were of no value and wholly lost to the plaintiffs, &c. The declaration also contained counts for goods sold and delivered, for goods bargained and sold, for work and labour, and upon an account stated.

The defendant pleaded, first, non assumpsit; secondly, to the first count, that the plaintiffs were not ready or willing to manufacture and complete the whole of the said goods and chattels in that count mentioned, and to fix the same when completed upon the said terms, in manner and form as the plaintiffs had in the said first count alleged; thirdly, to the first count, that he did suffer and permit the plaintiffs to proceed with and complete the manufacture of the said goods and chattels, and did not discharge the plaintiffs from proceeding with or completing the manufacture of the residue thereof, or any part thereof, for the defendant, modo et formâ; fourthly, to the first count, that, after the making of the said contract and promise by the plaintiffs and the defendants respectively in that count mentioned, and before any breach thereof by the defendant,
 *77] to wit, *on the 12th of August, 1842, it was mutually agreed by the plaintiffs and the defendant that neither of them should thereafter perform the said contract or promise on their respective parts, and that the same should be respectively then waived, abandoned, and rescinded, and that the plaintiffs and defendants should be then respectively discharged, and they then respectively discharged each other from performing the said contract and promise, and the said contract

and promise were then, in pursuance of the last-mentioned agreement, respectively waived, abandoned, and wholly rescinded by the plaintiffs and defendant respectively—verification.

The plaintiffs joined issue on the first three pleas, and replied *de injuriâ* to the fourth, whereupon issue was joined.

By their particulars of demand the plaintiffs claimed 535*l.* 10*s.* in respect of the contract referred to in the first count of the declaration; 2*5l.* “for preparing and copying the drawings of the machinery and plant in the first count mentioned, and for making a duplicate thereof for the defendant, and at his request, and which drawings were prepared for use in or about the month of July, 1842, and were then delivered to the defendant;” and 18*l.* 11*s.* 6*d.* for certain gun-metal cocks, levers, gauges, &c., supplied by the plaintiffs to the defendant.

The cause was tried before TINDAL, C. J., at the adjourned sittings in London after Michaelmas term, 1843. The plaintiffs were copper-founders and vat and backmakers, carrying on business in Shoe Lane; the defendant was an ironmonger, whose place of business was in the Quadrant, Regent Street. In June, 1842, the defendant, having received an order to fit up a brewery at Wimpole Hall, the seat of the Earl of Hardwicke, applied to the plaintiffs for an estimate for a copper, vats, and other suitable fittings. After several communications on the subject, the defendant on the 24th of June wrote to the plaintiffs [•78 as follows:

“T. Wilkinson’s compliments to Messrs. Pontifex & Wood, and begs to enclose them an outline of his idea of the sizes that will do for the brewery in question; but which he submits to their superior judgment, and will call in the morning, as arranged, to see what they have done in it previously to the estimate being gone into. [Here followed a particular enumeration of the articles required, to be ‘guarantied to be kept in repair free of expense for twelve months after its completion.’] So that all and every expense must be included in the estimate, whether specified or not, (including a hand mashing machine;) so that you are to consider that you are to find every thing, except the bricklayers’ work, carpenters’ work, and the necessary labour requisite in removing heavy articles to fix them in their proper situations, which will place you in the same situation only as Mr. Wilkinson is bound.

“N. B. *No extras whatever will be allowed.*”

In reply to this note, the plaintiffs, on the 7th of July, wrote as follows:

“A dome and pan copper fitted up with chimney and valves, &c., [here followed a particular enumeration and description of all the articles required,] men’s coach-hire and time travelling, carriage of the whole to the job, men’s diet and lodging.

“The whole of the above, fitted up with the best material of each different sort, and with the best workmanship, and fixed complete, exclusive of any bricklayers’ or carpenters’ work, will come to 535*l.* 10*s.*

We also agree to repair any defect that may be found in the workmanship when the whole is set to work, and also to do any repairs that may be required for twelve months from the time of being finished, *79] provided such repairs are required in the fair wear and tear of the utensils, cocks, pipes, pumps, &c.; but we do not hold ourselves responsible, in any way, for any repairs that may be necessary to any part of the plant caused by negligence, accident, wilful neglect, or otherwise than fair wear and tear."

On the following day the defendant wrote to the plaintiffs as follows:—

"I have been confined to my room since I saw you, or you would have had the orders for the fittings of the brewhouse earlier. I beg you will put the copper immediately under hand; and it must be delivered at Wimpole in three weeks or a month, as the building is to be covered in by the end of July. The other part should be ready by the middle of August. I trust you will do all in your power to meet these arrangements. I must say the price is more than I expected, when I draw the comparison with the other house I spoke of, inasmuch as there is less pipe, and one pump less, and various other things. I really think you should make it the 500*l.* to cover all, as I must make the party a compliment of at least 10*l.*; and the same sum I have paid for the plans you saw. Be good enough to let me hear from you upon this subject; and let me have the other set of plans as early as you conveniently can."

On the 19th of July, the defendant wrote to a person in the employ of the plaintiffs as follows:—

"I trust you are getting on with the copper, as they are pushing me daily. Will you oblige me with a line when it will be ready, and I will then direct the carrier to call for it. You must also get on with the backs and other things fast; for I find that the whole thing must be completed *80] a month earlier than I expected. Perhaps you will send me a note when they will also be ready. The set of drawings for my use I have not yet received; also plan for setting the copper, at your early convenience.

"P. S. Be good enough to remind Mr. Pontifex to send me an answer to my last note."

To this letter the plaintiffs replied on the 21st:—

"We put the whole of the work in hand as soon as the order arrived; but we fear we shall not be able to complete it as soon as you name. We will, however, do all in our power to meet your wishes, so that the quality of the work is not injured. We shall be most happy to make a deduction from the amount of contract, if we find, when the job is completed, that we can do so. The whole of the articles are put down as low as possible; but in fixing we are obliged to allow a certain latitude; therefore it will much depend on what assistance we get on the spot: and whatever our estimate of the expense of fixing exceeds the costs, we shall be happy to give you the benefit of."

The order for the goods which formed the subject of the second count, was contained in a letter of the 1st of August, describing them, and requesting that they might be sent as soon as possible, "with a note when the copper will be ready, and also the plans, which T. W. has not yet received."

On the 12th of August the plaintiffs addressed the following letter to the defendant:—

"E. & W. Pontifex & Wood present their compliments, and beg to acquaint Mr. Wilkinson that the dome of the copper having cracked in the working, they cannot proceed further with it till they get a dome, and that it will be ten days before it is ready. In the mean time it will be advisable to make a final arrangement as to the payment. Mr. Wilkinson said he would pay *as he received the money. This will be perfectly satisfactory, if he will give an order on Lord Hardwicke's steward for the amount." [81]

It appeared, that, in consequence of this note, some personal communication took place between the parties, which ended in the defendant's giving the plaintiffs a reference as to his responsibility: and on the 15th of August the plaintiffs wrote—"We have made the inquiry where you referred to; and it is not so satisfactory as to justify us in giving you credit for such an amount without some security;" and again on the 19th, "I will call on you any time you appoint next week, although I cannot see what use it will be, unless you are prepared to give some security. We have made inquiries of the parties you have referred us to, and they were so guarded and reserved in what they stated, that the reference cannot be considered as at all satisfactory. We are not desirous to drive you (as you seem to think) into a corner: we are desirous, on the contrary, to do all we can for your accommodation consistent with our own security, which you very fairly admitted we were bound to look to."

On the 25th, the defendant, in a letter addressed to the plaintiffs, expostulated with them upon what he called "an attempt to make an inroad upon his credit and standing in society as a tradesman;" to which the plaintiffs replied as follows:—

"In the position in which things were when I saw you last, as men of business we could not be satisfied with any thing short of security. Being extremely desirous to ascertain the truth, we have been, and are, making other inquiries. We shall be most happy if the result *will* alter our views. When we have completed them we will communicate with you, and will endeavour that the delay shall be as short as possible."

*On the same day the defendant referred the plaintiffs to a firm at Birmingham with which he had extensive dealings; and on the 26th, he received from the plaintiffs the following:— [82]

"Since my letter of yesterday we have made the inquiries referred to, which, we regret, confirm our impressions as to the necessity of a security.

We had hoped that the result would have been different. Notwithstanding our desire to give a favourable interpretation to our information, yet, as prudent and cautious men of business, we cannot, looking at all the circumstances, come to any other conclusion. We must, therefore, beg the favour of your providing for us the required security, or giving us an order for payment upon the steward of the Earl of Hardwicke, or obtaining the promise of the architect to give us an order for payment of our account."

The defendant, in a letter of the 29th of August, declined to give security or an order as required, and insisted upon the plaintiffs giving up the order or finishing it at once, as he could not allow it to go on unless they gave an undertaking to deliver and fix the whole in one month from that time; and also intimating that "the cocks, &c. (ordered on the 1st) not being sent in time, he must decline taking them, as he had got them elsewhere." The plaintiffs' answer to this letter was as follows:—

"We assure you we extremely regret the position we are in with you. With every disposition to maintain the kindly feelings with which we commenced, we find that, as men of business, we are unable to pursue any other than the plan we have proposed to you for security. We should propose to take the payment you would receive, but that you should contrive some means by which we may be assured that the money *83] will fall *into our hands. We are aware that this is only another mode of asking security; but we wish to leave the mode to yourself by which we may be made secure. If you were in our position, you would at once perceive that we are only doing that which you yourself would do. The cocks are nearly ready."

On the following day, viz. the 30th of August, the defendant's attorney wrote to the plaintiffs as follows:—

"My client, Mr. Wilkinson, of the Quadrant, Regent Street, has sent me a contract entered into by you with him, and some correspondence relating thereto. In ignorance of the plan upon which your firm conducts its business, it does appear to me that your course of conduct in this matter savours of injustice, if not of vexatious and untradesman-like conduct.

"I am of course open to your version of the story; but, as at present instructed, I find a contract anxiously sought for and entered into by you for the supplying certain work to Mr. Wilkinson. This contract is dated the 7th of July. On the 21st you write the work is in progress of completion, and on the 12th of August Mr. Wilkinson is for the first time called upon to satisfy you of his responsibility. Surely, it became you to be less tardy in taking this new ground. However, he refers you to a respectable house, from which you receive assurances which would have been satisfactory, but for reasons in no way affecting my client. Mr. W. then refers you to a very substantial firm at Birmingham, with

whom he has long transacted business. You decline to apply. Mr. Steel, a very respectable man, then takes the trouble to call on you; and, from his statement, it appears you have conceived some opinion prejudicial to Mr. Wilkinson's propriety of conduct: and I therefore call upon you, as respectable men, in common justice, to allow him an opportunity to remove these "impressions. I must require this [*84 independently of any existing difference between you."

In reply to this letter the plaintiffs intimated, on the following day, that they were not satisfied with the reference the defendant gave them, and therefore required some security "for the payment of their goods *before they were delivered.*"

On the 31st of August, the defendant's attorney again addressed the plaintiffs as follows:—

"As I find from the tenor of your reply to my letter that we shall be unable to settle this matter, I have no alternative but to advise my client to insist on your completion of your contract, if he considers it beneficial, as I consider you should have doubted his responsibility before you agreed to furnish the work."

And on the 14th of September he again addressed them as follows:—

"I communicated your condition for performance of the work on account of Mr. Wilkinson, to him; and, although I still contend that it was quite out of your power to maintain the position you assumed, we have considered it more advisable to dispense with your assistance in the matter. I accordingly beg to return your plans. You will oblige me by giving any plans you have belonging to Mr. Wilkinson to the bearer."

To this the plaintiffs replied on the same day:—"Although Mr. Wilkinson may consider it more desirable to dispense with our assistance in the supply of the goods he has ordered, we shall not submit to the loss of making the various articles, and having them thrown on our hands, which, we suppose, is what you mean by the above observation. As soon as finished, we shall require payment for them; and you will consider this as a notice to that effect."

*And on the 16th of September the defendant received from the [*85 plaintiffs' attorneys the following notice:—

"We are desired by our clients, Messrs. Pontifex, of Shoe Lane, to inform you that the copper, mash-tun, pipes, and cocks, ordered by you, are ready; and that the other things are proceeding with all possible despatch. The copper, mash-tun, &c., will be delivered upon payment by you of the value, according to your order: and they desire us also to say, that, whenever you shall pay for the remainder of the things, they will also be prepared to fix them. In case payment is not made in due course, we have instructions to proceed against you."

On the part of the defendant it was insisted, that, assuming the contract declared on to be a binding contract within the statute of frauds,

the fixing the work was, by its terms, a condition precedent to the plaintiffs' right to demand payment, or at least that the fixing and the payment were to be simultaneous acts; (a) that, upon the evidence, it was clear that the plaintiffs were not ready and willing to complete and fix, as alleged in the first count; and that it was their default alone that prevented the contract from being carried into effect. It was further submitted, that there was no complete contract to satisfy the statute, that which was relied on, as the contract, being silent as to the time and mode of payment, and being in other respects not a final agreement.

With respect to the cocks, &c., the subject of the demand in the second count, the evidence was, that, on the 19th of September, they were sent in a cart to the defendant's shop, that a portion of them were *86] carried in and laid on the floor, but that the defendant caused them to be replaced in the cart, and refused to receive them. As to the plans, it appeared that they consisted of two sets, the one a set of working plans which had been made for the use of the plaintiffs, the other a copy for the defendant, *the latter only having been delivered*.

For the defendant it was urged, that there was no delivery or appropriation or acceptance to entitle the plaintiffs to recover either on the count for goods sold and delivered, or goods bargained and sold, the price of the cocks or of the plans, and that those articles being merely accessory to the contract alleged in the first count, the plaintiffs failing to establish that count, failed altogether.

His lordship told the jury that the question for their consideration upon the first count was, which party was in fault in occasioning the contract not to be carried into effect; and that, if they thought the subsequent correspondence between the parties as to the defendant's responsibility, or the giving of security, imported into the contract an additional term to that effect, the plaintiffs were entitled to recover.

The jury returned a verdict for the plaintiffs, damages 175*l.* 2*s.* 3*d.*; being 140*l.* for the breach of the special contract; 16*l.* 10*s.* 9*d.* for the plans; and 18*l.* 11*s.* 6*d.* for the cocks, &c.

Byles, Serjt., in Hilary term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to reduce the damages by the amount of those found on the special contract; or for a new trial generally, on the grounds of misdirection, and that the verdict was against evidence.

Sir *T. Wilde*, Serjt., (with whom was *Petersdorff*,) in Easter term, *87] showed cause. The contract being silent *as to the time of payment, the law would imply that the goods were to be paid for upon being completed and fixed, just as the law will imply a contract for a reasonable time where the parties have omitted to express it; *Acebal v. Levy*, 10 Bingh. 376, 4 M. & Sc. 217; *Hoadly v. McLaine*, 10 Bingh. 482, 4 M. & Sc. 340; *Elmore v. Kingscote*, 5 B. & C. 583,

(a) It is difficult to conceive of two acts as simultaneous, one of which (payment) is momentary, and the other (fixing the articles) continuous.

8 D. & R. 343. [CRESSWELL, J., referred to *Ashcroft v. Morrin*, 4 Mann. & Gr. 450.] Here, before the arrival of the time for the completion of the contract, viz., on the 12th of August, the plaintiffs had notice from the defendant that he did not mean to pay for the goods on delivery. The defendant had then broken his contract; and from that time the parties were acting upon an understanding that the defendant was not ready to pay for the goods upon the delivery and fixing thereof. [CRESSWELL, J. Suppose the defendant had expressly said he would not pay for the goods at the time of delivery, would the plaintiffs have been entitled to maintain an action against him for not allowing them to fix and deliver the goods, the time for the performance of the defendant's part of the contract not having arrived?] Substantially they would. These articles, it is to be observed, are not such as the plaintiffs could take back when once fixed. [CRESSWELL, J. In *Hoadly v. McLaine* the action was for not accepting the carriage. TINDAL, C. J. That would seem to have been the proper form of action here.] Where the delivery and payment are to be simultaneous acts, and the buyer gives notice that he will not pay for the goods on delivery, the seller would be placed in a situation of extreme peril if he were bound to deliver the goods before he could sue the buyer for his breach of contract. It is not open to the defendant's counsel now to object that the *Lord Chief Justice, [*88 in his direction to the jury, adopted the precise mode in which the question was stated by himself in addressing the jury. With respect to the cocks, &c., the order for them was quite independent of the special contract; and the evidence showed a sufficient delivery to entitle the plaintiffs to recover their value as for goods sold and delivered. As to the plans, the defendant could not have been misled by the statement in the particulars that they had been delivered to him. He must have known that one set of the plans was necessarily retained by the plaintiffs to enable them to do the work. Particulars of demand are not to be construed with the same strictness as special pleas.(a)

Byles, Serjt., in support of his rule. In the absence of an express contract to the contrary, the fixing of the work and the payment of the price must be contemporaneous(b) acts. The plaintiffs having refused to perform their part of the contract by the delivery and fixing of the articles, their right to call upon the defendant for payment never attached. The contract being in writing, nothing that passed by parol could be allowed to vary it; *Goss v. Lord Nugent*, 5 B. & Ad. 58, 2 N. & M. 28; *Marshall v. Lynn*, 6 M. & W. 109. And there is nothing in the correspondence that ensued between the parties after the plaintiffs declined to proceed with the work unless security were given for the payment of the price, that amounted to a new contract. The question left by the Lord Chief Justice to the jury was not the proper one to be submitted to them upon the record as framed. The real question was, whether the plain-

(a) See *Brown v. Hodgson*, 4 Taunt. 190.

(b) Vide *supra*, 85, n. a.

tiffs had performed their part of the contract so as to be entitled to call
 *89] upon the defendant to perform his. And, whatever may have
 *been urged before the jury, such was not the meaning of the defendant's counsel. With respect to the cocks and other small articles, the plaintiffs clearly cannot recover the price of them, either under the count for goods sold and delivered, goods bargained and sold, or work and labour: their remedy, if under the circumstances the defendant was not justified in refusing to receive them, was by an action for refusing to accept pursuant to his contract: *Atkinson v. Bell*, 8 B. & C. 277, 2 Mann. & R. 292. Then, as to the plans, the particulars of demand charge for the whole as delivered to the defendant: whereas, as to one set, it was conceded that they were not, and never were intended to be, delivered, but were made for the plaintiffs' own use. [TINDAL, C. J. If the plaintiffs fail to recover on the special count for breach of the contract, I do not see how they can recover for the working plans, which would not have been charged for had the work been completed and paid for according to the contract.] These plans were all ancillary to the contract; and, the contract failing, they necessarily fall with it. Besides, the defendant's proposal of the 24th of June expressly provides that "no extras whatever will be allowed." There clearly, then, was no implied promise on the defendant's part to pay for any of the plans.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. The question in this case has been raised before us on a rule obtained by the defendant, either to reduce the damages by the amount of those found on the special count, that is, in substance, to enter a verdict for the defendant, on that count, according to leave given at the trial, or for a new trial generally on the whole of the cause of action.

*90] *The declaration contained a special count upon a contract that the plaintiffs should manufacture and make, and fix complete (except bricklayers' work, &c.) for the defendant, a certain copper and other utensils necessary for the fitting up of a brewhouse, according to a specification, for the price of 535*l.* 10*s.*, and that the defendant should permit the plaintiffs to put up the work, and should pay for the same on the delivery and fixing up of the work: and the breach assigned was, that the defendant would not permit the plaintiffs further to proceed with and complete the work, but absolutely discharged them from proceeding with the completion thereof.

There were counts for goods sold and delivered, goods bargained and sold, and work and labour and materials; which general counts applied to other and different demands. But, as the jury have found their verdict for the plaintiffs as to the whole of the demand, though with separate damages upon the different counts, and as the defendant contends the verdict is wrong in every part, the first ground upon which the

rule was granted will not apply to this state of the case ; but the real question is, whether there should be a new trial.

The case was argued on the part of the defendant upon the ground of misdirection by the judge at the trial. The questions as to the special count which arose upon the pleadings were, in point of form, two ; first, whether the plaintiffs were ready and willing to manufacture and complete the whole of the goods, and to fix the same according to the terms of the contract ; secondly, whether the defendant discharged the plaintiffs from proceeding with and completing the manufacture of the said goods ; which two questions amount, in reality, to no more than one, viz., whether the non-completion of the contract proceeded from the *wrongful act and conduct of the plaintiffs in refusing to finish, [*91 or of the defendant in not permitting them to finish the goods according to the terms of the contract.

The mode in which this question was left by the judge to the jury was this,—which party was in fault in occasioning the contract not to be carried into effect ? And we see no objection, in point of law, to this mode of leaving the question to the jury under the evidence ; the more especially, as the defendant's counsel, in his reply to the jury, had himself stated this to be the proper question for their consideration. And if in commenting on the evidence given at the trial with the view to the explanation of the meaning of this question, and of the ground of decision proper for the jury, the judge made some observations which, as my brother *Byles* contended before us, gave a different sense to this question than what he himself intended, we think he should have made some suggestion to that effect at the time for the consideration of the judge, and not brought such objection forward now, for the first time, before us : and, even supposing the observations to have been made by the judge in the unqualified manner now stated, that the making such observations cannot support a rule for a new trial on the ground of misdirection, where the substantial question was, in fact, left for the consideration of the jury.

The question, however, whether the plaintiffs wrongfully withdrew from the completion of the work on their part, or whether they were discharged therefrom by the conduct of the defendant, was a question of fact, depending upon the construction the jury put, as well upon the acts of the parties as upon their correspondence : and, upon this question of fact, we are not satisfied that they have come to a proper conclusion, or that justice can be done between the parties without submitting the case to another trial. And we therefore give the *defendant the opportunity of having the question re-considered, by granting a new [*92 trial upon the usual terms.

It becomes, therefore, unnecessary that we should, at present, give any opinion upon the points which have been argued with respect to the other counts of the declaration.

Rule absolute for a new trial, upon payment of costs.

LEGGE v. BOYD. Jan. 17.

A revenue act (3 & 4 W. 4, c. 52, s. 50) directs that "foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, shall be subject to the same duties as goods of the like kind imported into the United Kingdom respectively, are subject to; provided that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor, &c., and shall be deemed to be unenumerated goods, and shall be liable to be charged with duty accordingly;" that is, 6l. per cent. ad valorem. Certain unmanufactured tobacco had been imported in the year 1835, and warehoused in the London Docks. In March, 1836, it was, with the permission of the commissioners of the customs, shipped under bond for Ireland. In the course of the voyage the ship, having received damage, was abandoned and driven on shore where she remained several days, when, the cargo having been landed, the vessel was got off, and though considerably damaged, was afterwards repaired by parties to whom she was sold:—*Held*, that the tobacco was not "wreck" within the meaning of the statute.

CASE. The declaration stated that the plaintiff, on the 10th of August, 1836, was the owner, and lawfully entitled to the possession, of certain goods, that is to say, twenty-five hogsheads of tobacco, three bags of tobacco, and two mats of tobacco, of great value, to wit, of the value of 10,000*l.*, and which tobacco was then in a certain warehouse subject to the payment of the duties of customs thereon to his late Majesty King William the Fourth, and subject also to the control and direction of the defendant, he then being the collector of the customs at the port of London: that the plaintiff, on the day and year aforesaid, produced and tendered and offered to the defendant, he then being *the collector
*93] of the said customs as aforesaid, a bill of the entry of the said goods, written and arranged in the manner and form, and expressing and containing therein the several matters and particulars, required by the statute in such case made and provided to be expressed and contained therein, and by the collector of the customs in that behalf: and then offered to pay down to the defendant, he being such collector as aforesaid, and the proper officer to receive the same in that behalf, the sum of 261*l.* 1*s.* 6*d.*, being the duties of customs and charges which were payable upon the said goods which were so mentioned in such entry; and then also produced and tendered and offered to the defendant two duplicates of the said bill, and offered to deliver to him such number of the said duplicates as he and the controller of the customs of the said port of London required, in such form and in such manner as by the said statute and by the said collector and controller was directed and required; and then requested the defendant to sign such bill, in order that the same might be transmitted to the proper officer or person in that behalf, as the warrant for the delivery of the said goods, and to enable the plaintiff to receive possession of the same; and then also requested and required the defendant that he should cause the said goods to be delivered to him the plaintiff; whereupon it then became and was the duty of the defendant to accept and receive from the plaintiff the same duties and charges aforesaid, and to sign the said bill, and to enable the plaintiff to make use of the same for the purpose of obtaining the deli-

very and possession of the said goods, and to cause the said goods to be delivered to the plaintiff: yet the defendant, not regarding his said duty, did not nor would, when the said duties and charges as aforesaid were so tendered to him as aforesaid, receive the said duties and *charges, [94 or any part thereof, but wholly refused so to do, and then also wholly refused to sign the said bill, although requested to do so as aforesaid, and then also wholly refused to cause the said goods to be delivered to the plaintiff; by means whereof the plaintiff had been and was wholly hindered and prevented from obtaining the delivery and possession of his said goods, and was also put to great trouble and inconvenience, and also to great charges and expenses, to wit, the sum of 50*l.*, in and about the endeavouring to obtain the possession and delivery of the said goods; and the plaintiff was thereby also hindered and prevented from selling and disposing of the said goods to a great advantage, as he should and might have done, and thereby sustained a great loss, to wit, the extent of 5000*l.*; and was thereby also deprived of great gains and profits, to wit, to the extent of 5000*l.*, which should and might and otherwise would have arisen and accrued to him had the said duties and charges been received, and the said bill signed, and the defendant caused the said goods to be delivered to him as aforesaid.

The defendant pleaded not guilty; and a special verdict was found which set forth the following facts:—

The tobacco mentioned in the declaration was unmanufactured tobacco imported in different ships in the course of the year 1835, and was duly warehoused, under the statute in that behalf made, in the warehouses of the London Docks; and the said tobacco was not the produce of, or imported from, any British possession in America.

In March, 1836, application was made by the owner of the tobacco, to remove it from the warehouse in London, where it then was, to Londonderry, in Ireland, under the provisions of the warehousing act; and permission was granted upon the usual course being *pursued; and [95 afterwards, upon the proper documents being produced, the tobacco was delivered out of the London Docks, and shipped on board the *Sarah* for Londonderry.

The *Sarah* sailed from London with the tobacco on board on the 13th of March, 1836, and in the course of her voyage to Londonderry arrived at Torbay, on the coast of Devon, on the 26th of March in that year.

On Monday, the 28th of March, 1836, whilst the *Sarah* was at anchor at Torbay, at four in the morning, during a heavy gale of wind, a vessel called the *Charles Grant* (which had previously been riding at about two and a half cables' length from the *Sarah*) drove foul of her, and carried away both her chains, her bowsprit, and masts, cathead, stanchions, bulwarks, and covering board; and the master and crew of the *Sarah*, supposing her larboard side to have been stove in, and the sea making a clear breach over her, with great difficulty got on board the *Charles*

Grant for the preservation of their lives, as they then imagined that the Sarah was going down.

The Sarah drifted away towards the shore. The master of the Sarah, at daybreak of the said 28th of March, got on board a fishing sloop, which put him on shore about eight o'clock in the morning, when he immediately proceeded, accompanied by the agent to Lloyd's, to the spot where he imagined the ship had gone on shore, and found her lying on her side upon the rocks at Roundham Head, near Paignton, about five miles from Brixham; and the sea was then making a complete breach over her. On their arrival, the master and agent found the coast-guard and some other people assembled on the shore, about fifty yards from the ship; but the day being a stormy one, and the night before having been very stormy, none of them could get on board till the tide fell.

*96] *The weather having become more moderate, the master of the Sarah, together with the said agent, succeeded in getting on board her about half-past ten o'clock in the morning of the same Monday, and found her full of water.

Some parties from salvage vessels had previously obtained possession of her, and they, together with the master and the said agent, afterwards succeeded in saving twenty-five hogsheads, three bags, and two mats of tobacco, being the tobacco in question in this action. The ship was in great danger; and it was a very difficult job to get her off the rocks, from twenty to thirty men being employed for that purpose from the said Monday until the Friday following. In order to get her off, it was necessary to take out her cargo; and, unless that had been done, both ship and cargo would have perished. The tobacco in question was accordingly taken out of her on the Wednesday after she so got on shore, which was as soon as the master and agent and other people employed could do it.

When the tobacco was so taken out of the ship, all her masts were gone; she was bilged, and had a hole in her bottom, and there was a great deal of water in her. Within a month afterwards she was sold by auction on behalf and by authority of the owners, for the sum of 310*l.*, having before and at the time of the accident been worth 900*l.* She was then repaired, and subsequently employed by the purchasers, and is still a British registered vessel, resorting to Brixham, where she was two months ago.

The tobacco thus saved was placed in the hands of certain officers of the customs at Torbay by the salvors, and was forwarded by the said officers to London, and lodged in the St. Katherine's Docks in London.

*97] The tobacco, after it *was so lodged in the St. Katherine's Docks, was sold by the owners thereof to the plaintiff.

The tobacco was entered by the parties, as "wreck tobacco, ex Squid;" but, in the books of the officers of the customs, it stands, as "tobacco by the Squid, Slade, Dartmouth."

The tobacco sustained considerable damage by its having been immersed in sea water; and the weight of it, when landed from the Squid, was very much greater than when shipped on board the Sarah.

In order to determine the value of the tobacco in its damaged state, it was, previously to the tender hereinafter mentioned, put up for sale by public auction by the plaintiff, as duty paid, and was bought in at such sale, inasmuch as the price then offered for the tobacco was less than the amount of the duty of 3s. per pound upon its original weight.

The value of the tobacco at the time of the tender of the duty by the plaintiff's agent, as hereinafter mentioned, namely, on the 14th of August, 1836, was less than the duty of 3s. per pound upon its original weight; and it could not be sold for that amount of duty.

On the 14th of August, 1836, a custom-house agent was instructed, on behalf of the plaintiff, to enter for home consumption the said twenty-five hogsheads, three bags, and two mats of tobacco. He, accordingly, prepared a bill of entry for the said tobacco, with the proper number of duplicates, which were in the following form:—

St. Katherine's Dock.

"Squid, Slade, @ Brixham, ex Sarah, Wilkinson, for Londonderry, wrecked and derelict in Torbay on her voyage from London.

"JOHN BARRY.

*"Home consumption tobacco.

[*98

"Warehoused by W. G. Legge.

"March 4th, 1836.

	lbs.		
"S V. No. 6. 1 hhd.	1491	net.	
8. 1	- 1503	-	
14. 1	- 1776	-	
15. 1	- 2002	-	
17. 1	- 2053	-	
22. 1	- 1820	-	
	<hr/>		
	10645		
	<hr/>		

Six hogsheads, containing ten thousand six hundred and forty-five pounds unmanufactured tobacco, paying ad valorem duty at five pounds per cent. as unenumerated goods. Pr Board's order, dated August 13th, 1839. Value 950l. Nine hundred and fifty pounds.

"W. WYBROW.

THOMAS COPE.

"Duty	-	-	£47 10 0
"Rent	-	-	0 12 0
			<hr/>
			£48 2 0
			<hr/>

"I, Charles Ellis, of 5 Harp Lane, do hereby declare that I am authorized by the importer of the goods contained in this entry, and that I enter the same at the sum of nine hundred and fifty pounds. Witness, my hand, this 14th August, 1839.

"14th August, 1839.

"CHARLES ELLIS."

Having prepared the said bill of entry, the plaintiff's said agent (being

authorized by the plaintiff in that behalf) went to the Long Room in the Custom House, to a person employed there under the collector, and called a receiver of duties, (and which person was then employed in receiving duties,) stating that he came to pay the duty on the said tobacco. The said receiver, however, refused to receive the duties himself, saying it was an unusual case; and on that ground he referred the said agent to the collector.

The said agent thereupon went to the defendant, and tendered to him *99] the sum of 258*l.* 0*s.* 6*d.*, being the *amount of the duties on the said tobacco, if calculated at 5 per cent. ad valorem; and the said agent at the said time produced to the defendant the said bill of entry and duplicates, and required him to sign the said bill of entry. The defendant would not accept the said sum of 258*l.* 0*s.* 6*d.*, and refused to sign the said bills of entry, or either of them. The defendant did not state, nor was he asked to state, what sum he required to be paid. The said agent knew that the tobacco had been warehoused in London, and had been entered as wrecked on a voyage from London to London-derry. The said agent asked the defendant if the bills of entry were made in the form and manner that he wished: the defendant answered they were perfectly correct, and that he had no objection to them, but that he would not take the money offered. The defendant did not assign any reason for refusing to accept the money; but the amount of duty which was payable on the tobacco had been the matter of frequent discussion and dispute between the defendant and the agent of the plaintiff.

The defendant, during all the time aforesaid, was collector of the duties for the port of London. According to the course of business at the Custom House, he, in the first instance, decides what amount of duty is to be charged on goods: but, if any dispute arises as to the proper amount of duty which ought to be so charged, the Commissioners of Her Majesty's Customs decide what amount shall be charged; and, if the Commissioners are of opinion that the proper amount of duty has not been paid, the collector ought not, according to the course of business, to sign the entry and thereby authorize the delivery of the goods.

The course of business, when goods warehoused under the statute are required to be delivered out, during all the time aforesaid, was, and is, as follows; that is to say, two bills of entry are dropped into a box in the *100] *Long Room aforesaid. A clerk, called a reader, then takes them out of the box and reads one to the collector; and the goods cannot be got out of the warehouse without the signatures of the collector and the controller of the customs, of whom the collector must sign first. When there is no dispute about the amount of duty, it is usual to see one of the clerks: but, in cases of doubt or difficulty, persons applying to pay duties are referred to the collector. On receipt of the warrant signed by the collector, the goods are delivered out of the warehouse, as

a matter of course; and the bill of entry, after it is signed by the collector and controller, becomes the warrant for delivery.

Where goods are in bond, and the proprietor wishes to remove them, to be re-warehoused in some other port, the course of business, during all the time aforesaid was, and is, as follows; that is to say, a bond note is first given, intimating the proprietor's intention to remove the goods, and the name of the port to which they are to be removed. The owner of the goods then executes and gives to an officer employed and appointed by the Commissioners of Her Majesty's Customs for the collection and management of the customs in and throughout the United Kingdom, a bond with one surety conditioned for the arrival and re-warehousing of the goods at the port to which they are to be removed within a reasonable time; and until such bond is so given the goods cannot be removed from the warehouse.

Upon the occasion of the removal of the tobacco in question from the warehouses in the London Docks in the month of March, 1836, a bond note was, according to the said course of business, given by the owner of the said tobacco, in the words and figures following; that is to say,

“76 | 11 | 154

“Delivered 3285 lbs.

287.

15 less.

“Goods for removal.

“Bond Office, Customs, London, 2d of March, 1836.

[*101

Mr. Richard Leighton, of No. 7 Hertford Road, Kingsland, intends to remove the under-mentioned goods, warehoused at London Docks by Gilliat & Co. the 16th of September, 1835, ex the *Napier*, Lucas, master, @ *Virginia*, by sea to the port of Londonderry, there to be warehoused, viz., two hogshheads unmanufactured tobacco, weighing 3600 lbs., for home use only, and to pay the duty there according to the weight ascertained at the time of removal, conformably to the Board's minute dated the 26th March, 1831, value 600*l.*, say six hundred pounds.

“This is to certify that security is taken for the due arrival and re-warehousing thereof at the above port.

“W. H. BROWNE,

“Clerk of the Bonds.

“Consigned to Robert Bond & Co., Londonderry.”

Upon the same occasion a bond was made and given by the owners of the tobacco in question, with one surety, according to the course of business, conditioned for the arrival of the said tobacco at Londonderry, and the re-warehousing thereof within a reasonable time; and such bond has not been cancelled.

Bonds so given as aforesaid are not, according to the course of business, cancelled when the goods are lost, without application to the Commissioners of Customs. According to the usual course of business, the bond is only cancelled upon the receipt of a certificate that the duty has been

paid at the place where (according to the condition of the bond) the goods are to be delivered and re-warehoused; in which event it is cancelled.

On the 21st of May, 1836, the plaintiff wrote and sent the following letter to the Commissioners of Customs, *after the tobacco was

*102] lodged as aforesaid in the St. Katherine's Docks.

"Honourable Sirs,—I have now lying in the St. Katherine's Docks the following hhds. of tobacco:—

				Cwt.	qrs.	lbs.
"S V. No. 3, weighing	-	-	-	12	2	18
6	-	-	-	13	1	7
8	-	-	-	13	1	19
14	-	-	-	15	3	12
15	-	-	-	17	3	14
17	-	-	-	18	1	9
22	-	-	-	16	1	0

Cwt. 107 2 23

ex Squid, Slade, master, @ Brixham, saved from the Sarah, M. Wilkin-son, master, wrecked and derelict, during the late gales, at or near Tor bay. The tobacco in question is so much damaged with salt water that a great portion thereof (probably the whole) will not fetch the customs duty, 3s. per lb.

"I therefore respectfully request, that, in conformity with the 3 & 4 W. 4, c. 52, s. 50, your honours will be pleased to cause immediate instructions to be given to the officers at the docks, directing them to attend the examination and separation of the sound from the damaged tobacco contained in each hogshead, as also the sale of the same at public auction on Friday next, the 27th instant; and that, in the event of any lots fetching 3s. or upwards per lb., (but which is very doubtful,) the same, upon delivery for home consumption, be subjected to the full rated duty, but that such lots as will not fetch the 3s. per lb. be so delivered for home consumption upon payment of the ad valorem duty of 5 per cent., as an unenumerated article."

*103] "On the 15th of August, 1836, the plaintiff wrote and sent the following letter to the Commissioners of Customs:—

"Honourable Sirs,—The court of Queen's Bench having recently decided the case of *Barry v. Arnaud* in favour of the plaintiff, referring to that of *Legge v. Boyd*, particularly taking into consideration that the tobacco, by being wet and lying in the St. Katherine's Docks upwards of three years, has very much deteriorated in value, but will probably still produce something; I beg therefore respectfully to submit that it is advisable that the said tobacco consisting of 19 hhds., 2 mats, 3 bags, should be admitted to entry at the ad valorem duty at 5 per cent. upon the amount, as tendered, such being the rate legally due at the time (as

decided by Lord *Denman*,) and sold forthwith: it being, however, most distinctly understood and agreed that the payment of such duty and sale of the tobacco shall be without prejudice to either plaintiff or defendant, as respects the said suit; the sole object of the sale being to prevent the property from being totally sacrificed."

The tobacco mentioned in the said letters is the tobacco mentioned in the declaration in this suit.

This action was commenced within six months next after the refusal by the defendant to sign the said bill of entry: and on the 22d of December, 1836 (which was more than one calendar month before the writ in this action was sued out against the defendant,) the following notice in writing was delivered to the defendant by the attorney for the plaintiff; in which notice the true name and place of abode of the plaintiff, and the true name and place of abode of the said attorney, are stated.

"To Charles Boyd, gentleman, collector of His Majesty's Customs for the port of London, being an officer of His Majesty's Customs.

"I, L. S. B., do hereby, as the attorney of and for William George Legge, of, &c., merchant, duly authorized in that behalf, [*104 according to the form of the statute in such case made and provided, give you notice that the said W. G. Legge will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of His Majesty's court of Common Pleas at Westminster, against you, at the suit of the said W. G. Legge, and proceed thereupon according to law; for that whereas you, the above named Charles Boyd, on the 10th of August, 1836, unlawfully refused to deliver or cause to be delivered to the said W. G. Legge a large quantity, to wit, 25 hhds. of tobacco, three bags of tobacco, and two mats of tobacco, of the said W. G. Legge, being of great value, to wit, of the value of 4000*l.*, although the said W. G. Legge was then ready and willing, and then offered to pay the amount of all the duties and charges due thereon or payable for or in respect thereof, and then requested you to deliver, or cause to be delivered, the said tobacco to him the said W. G. Legge; and also for that you then converted and disposed thereof to your own use: to the damage of the said W. G. Legge of 4000*l.* Dated, &c."

The special verdict then concluded by referring it to the court to say, whether, upon the whole matter aforesaid, the said twenty-five hogsheads, three bags, and two mats of tobacco, on the said 14th of August, 1836, were foreign goods and wreck brought or coming into the United Kingdom, within the meaning of the statute 3 & 4 W. 4, c. 52, s. 50; and whether the full duty of 3*s.* per pound attached upon the said twenty-five hogsheads, three bags, and two mats of tobacco, and was legally chargeable thereon at the time when the said sum of 250*l.* 0*s.* 6*d.* was tendered to the defendant; and whether it was the duty of the defendant to receive the said sum and to sign the said bill of entry [*105

under the circumstances hereinbefore set forth, and so to authorize the delivery to the plaintiff's said agent of the said twenty-five hogsheads, three bags, and two mats of tobacco; and whether the application ought, under the statutes 3 & 4 W. 4, cc. 52 and 56, or either of those statutes, to have been made to the discretion of the Commissioners of His Majesty's Customs, and not to the defendant; and whether the plaintiff had sued the right person for the cause of action in the declaration mentioned; and whether any notice of action was necessary, and, if so, whether the notice of action above set forth was sufficient.

And that if, upon the whole matter aforesaid, it should seem to the court that the said twenty-five hogsheads, three bags, and two mats of tobacco, on the said 14th of August, 1836, were foreign goods and wreck brought or coming into the United Kingdom, within the meaning of the statute 3 & 4 W. 4, c. 52, s. 50; and that the full duty of 3*s.* per pound did not attach upon the said twenty-five hogsheads, three bags, and two mats of tobacco, or was not legally chargeable thereon, at the time when the said sum of 258*l.* 0*s.* 6*d.* was so tendered to the defendant; and that it was the duty of the defendant to receive the said sum and sign the said bill of entry under the circumstances hereinbefore set forth, and so to authorize the delivery to the plaintiff's said agent of the said twenty-five hogsheads, three bags, and two mats of tobacco; and that the said application ought not to have been made to the discretion of the said commissioners, but to the defendant; and that the plaintiff had sued the right person for the cause of action in the declaration mentioned; and that either no notice of action was necessary, or, if necessary, that the notice of action above set forth was sufficient: then the jurors said that the defendant was guilty of the grievances in the declaration mentioned; and in that case they assessed the *damages of the
 *106] plaintiff by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, to 1733*l.* 3*s.* 8*d.*, and for those costs and charges to 40*s.*

But that if, upon the whole matter aforesaid, it should seem to the court that the said twenty-five hogsheads, three bags, and two mats of tobacco, on the 14th of August, 1836, were *not* foreign goods and wreck brought or coming into the United Kingdom within the meaning of the statute 3 & 4 W. 4, c. 52, s. 50; and that the full duty of 3*s.* *did* attach upon the said twenty-five hogsheads, three bags, and two mats of tobacco, and was legally chargeable thereon, at the time when the said sum of 258*l.* 0*s.* 6*d.* was so tendered to the defendant; or that it was *not* the duty of the defendant to receive the said sum and sign the said bill of entry under the circumstances hereinbefore set forth, and so to authorize the delivery to the plaintiff's said agent of the said twenty-five hogsheads, three bags, and two mats of tobacco; or that the said application *ought* to have been made to the discretion of the said commissioners, and *not* to the defendant; or that the plaintiff had not sued the right

person for the cause of action in the declaration mentioned; or that a notice of action *was* necessary, and that the notice of action above set forth *was not* sufficient: then the jurors said that the defendant *was not* guilty of the grievances in the declaration mentioned, or any part thereof.

Channell, Serjt., (with whom was *Nesbitt*,) for the plaintiff. By the customs-duties act, 3 & 4 W. 4, c. 56, certain duties are authorized to be levied upon the importation, into this kingdom, of the articles mentioned in a schedule, tobacco being one of them, and being charged as follows:—"Unmanufactured, 3s. per pound; if the produce of and imported from any British possession in *America*, 2s. 9d. per pound; manufactured, or segars, 9s. per pound:" and at the end of the schedule is a provision imposing a duty of 5l. for every 100l. of the value, upon "goods, wares, and merchandise, not being either in part or wholly manufactured, and not being enumerated or described nor otherwise charged with duty, and not prohibited to be imported into or used in Great Britain or Ireland." By the fiftieth section of the act for the general regulation of the customs, 3 & 4 W. 4, c. 52, (which received the royal assent at the same time with the before-mentioned act,) it is enacted, "that all foreign goods derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to: provided that, if any such goods be of such sorts as are entitled to allowance for damage, such allowance shall be made under such regulations and conditions as the said commissioners shall from time to time direct: provided also, that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor, or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and shall be liable to, and be charged with, duty accordingly." But for the circumstances detailed in this special verdict the tobacco in question would have been chargeable, under the first-mentioned statute, with a duty of 3s. per pound. It is submitted, however, on behalf of the plaintiff, that, in consequence of the events that have occurred, the tobacco, not being worth the amount of duty, became subject to the operation of the proviso in the 3 & 4 W. 4, c. 52, s. 50, and ought to have been admitted at the ad valorem duty of 5l. per cent. The word "wreck," in legal signification, is capable of two different constructions: it may mean *goods cast on the shore*, so as to give to the crown, or to the grantee of the crown, the absolute and indefeasible property in them; or it may mean goods wrecked or cast away, as to which the right of the crown, or of the crown's grantee, has not attached, the property in them remaining in the owners. [CRESSWELL, J. If the vessel had been got off the rocks with the tobacco on board, could you have contended that it was wrecked?]

Probably not. [CRESSWELL, J. Is it the more "wreck" because the owner thought proper to take it on shore?] Lord HALE, in his treatise *de Jure Maris*, c. 7, p. 37, speaking of wreck, says: "The kinds of it are two; first, such as is called properly so, the goods cast upon the land or shore; secondly, improper, for goods that are a kind of sea-waifs or stray, flotsom, jetson, and lagon." And in p. 38 he says: "But all goods cast upon the shore are not, therefore, *ipso facto* wrecked, so as to entitle the king, or lord of a liberty, to take them: but it must have these qualities; 1st, it must be such goods or ship that is wrecked or perished at sea; 2d, though the ship or goods be wrecked and cast upon the shore, yet, if any living thing escape alive to land out of the ship, it is not such a wreck as gives a forfeiture; 3d, that these goods be cast upon the shore or land, and not brought thither in a ship or vessel." Here, the learned author is treating of "wreck proper," or wreck in its strict legal signification, which, "by the laws of England, is forfeit; and the property of the first owner is by the seizure of the king or his officer, or lord of the liberty having his franchise, wholly divested." In the next paragraph he speaks of wreck in its popular sense, that is, in the sense in which it is to be used in the construction of this statute: for, he says, p. 39, "But, if goods are cast upon the shore, though they have not all these properties, they may be seized by the king, or the lord that

*109] hath the liberty of wreck, *and lawfully detained till the right owner come and claim them, and make it appear that they are his; and the common law allowed him a year and a day for the making his claim." "And *nota*, (p. 40,) this claim is available only where the goods are cast upon the shore, but they are not a legal wreck, as perchance some living thing escaped to the land. But, where the goods are a legal wreck, this claim signifies nothing; for the goods are, *ipso facto*, forfeit by being wreck and seized: for the provision of the statute 3 Edw. 1, (Westm. 1, c. 4,) as to the claim and proof within the year and day, refers only to such goods as are cast upon the shore, but are not lawful wreck." These passages from HALE were cited, and the distinction between that species of wreck which divests the property of the owner, and entitles the crown or the lord of the manor to seize the goods, and the more qualified species which does not, *ipso facto*, change the property, was broadly adopted, by the Court of King's Bench, in the case of *The Bailiffs, &c. of Dunwich v. Sterry*, 1 B. & Ad. 831; where it was held that the grantee of wreck has a special property in all goods stranded within his liberty, and may maintain trespass against a wrongdoer for taking them away, though such goods were part of the cargo of a ship from which some person escaped alive to land, and though the owners, within a year and a day, claimed and identified them, and though the taking was before any seizure on behalf of the grantee. In *Barry v. Arnaud*, 10 Ad. & E. 646, 2 P. & D. 633, where the defendant, collector of customs, was held to be a ministerial officer of the crown,

and, as such, liable in case for non-feasance in the execution of his office, for refusing to sign a bill of entry without payment of an excessive amount of duty, the meaning of the term "wreck" in the 3 & 4 W. 4, c. 52, s. 50, was very much considered: and it was held, not *to be necessarily limited to goods which became forfeit to the crown, or its grantee, by not being claimed within a year [*110 and a day, according to the statute of Westminster 1. There, goods were imported into this country, warehoused, entered for exportation, and shipped for Belgium: the vessel was lost within the English port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner: and it was held that they were chargeable with duty as "wreck brought or coming into the United Kingdom," within the 3 & 4 W. 4, c. 52, s. 50. Lord DENMAN, in delivering the judgment of the court, says: "The word 'wreck,' no doubt, in both parts of the clause, comprehends goods which strictly and technically speaking are 'wreck:' but, as it is capable also of a larger sense, and as, in both parts, the object of the section can only be fully obtained by giving it that larger sense, we ought so to understand it. We are additionally led to this by considering that the term of contrast to the word 'wreck' is, not goods unforfeited, or goods whereof the owner is known, but goods imported, as if the distinction present to the minds of those who framed it was, not between goods subject and goods not subject to a franchise, but between goods arriving in a regular course of importation and those coming by the casualties of the seas and storms; and, accordingly, by the proviso, they are to be delivered over to the lord of the manor, or (using the most general words) 'other person entitled to receive the same.'" In that case, as in the present, the goods had originally been imported and warehoused here; the only difference being, that there the goods were afterwards removed from the warehouse to be transported to a foreign instead of a British port. [TINDAL, C. J. *Barry v. Arnaud* was a clear case of wreck. *CRESSWELL, J. Besides, from the form of the entry in that case, the duty never attached. Here, the duty did attach; and [*111 the question is, whether any thing has occurred to discharge the goods from their liability to the duty.] Notwithstanding the form of the entry, it was competent to the owner, at any time, to export them. The question is, whether, the commissioners having allowed the owner to ship the tobacco for Londonderry, and it having been wrecked on that voyage, the owner is not to be placed in the same situation as regards payment of duty as if it had been wrecked on its original importation. Though warehoused, the goods are in the same position in respect of their liability to duty as if they had never been unshipped at all. [Wilde, Serjt., referred to *The Attorney-General v. Ansted*, 12 M. & W. 520; where it was held, that the importer of goods from a foreign country is

liable, *on the importation*, to the duties of customs payable thereon; and this liability is not affected by the warehousing act, 3 & 4 W. 4, c. 57; the effect of which is only to give the merchant, in the case of goods warehoused under it, time for payment of the duties until the goods are entered for home consumption.] That case has no application here. [TINDAL, C. J. Can goods be said to be wrecked where the ship is not?] The special verdict finds that the ship could not have been saved without taking out her cargo. If a vessel, being on the seas, can only be kept afloat by the sacrifice of the cargo, it may be lawfully thrown overboard. [MAULE, J. In that event it would be jetsam: but that is not this case. You are rather confounding wreck with general average. CRESSWELL, J. The goods in question never were, in fact, out of the owner's possession.]

Sir T. Wilde, Serjt., (with whom was T. F. Ellis,) *contra*, was stopped by the court.

*112] TINDAL, C. J. In this case the first question upon which the jury have asked for the opinion of the court in point of law is, whether these hogsheads, bags, and mats of tobacco, on the 14th of August, 1836, were foreign goods and "wreck" brought or coming into the United Kingdom within the meaning of the statute 3 & 4 W. 4, c. 52, s. 50: and, if that question be decided against the plaintiff, it will become unnecessary to consider the others that are raised by this special verdict, all of which must be determined in his favour before we can hold the action to be maintainable. It appears to me that the facts found do not bring this tobacco within the fiftieth section of the act referred to. That there was no wreck of the ship is, I think, quite clear: the ship never perished; it was on shore, but it was never out of sight; and all those who were on board got on shore. The older cases lay it down, that, if a ship, being in distress, is deserted by all hands, and any one come to land, this is no wreck, properly so called, although the ship afterwards perish. The utmost that can be said here is, that the ship sustained considerable damage. Admitting, however, that there may be a wreck of goods as distinguished from wreck of the ship, (and I should conceive from the language of this statute that such might be the case, and indeed there is the known case of *Sheppard v. Gosnold*, Vaughan, 159, where it is laid down that goods that are wrecked pay no customs, and therefore we may assume that there may be, in contemplation of law, a wreck of goods, the ship itself not being wrecked,) the question is, what is the meaning of wreck of goods within the statute? Ibid. 168. It speaks first of goods which are "derelict," that is, which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive to the circumstances at the time: next it *speaks of

*113] goods that are "jetsam,"—that, by the act of the owner, have been voluntarily cast overboard to lighten the ship: next, of goods that are "flotsam," that is, goods that are found floating on the waves: and

lastly, it speaks of "wreck." I can only consider, after that enumeration,—which comprehends within it almost all the predicaments in which goods can be placed after the destruction of the ship,—that by "wreck," is meant, goods cast on shore by the force of the waves, in the proper sense of the words. Now, this tobacco, so far from having been brought or cast on shore by force of the waves as wreck, remained in the hold of the vessel until carried on shore by the owner. The crew only deserted her for the space of about four hours, when they went back again with sufficient assistance: and then the fact found by the jury is, that the tobacco was brought on shore, but considerably damaged. Looking, therefore, at the case in any point of view, I cannot understand how it can be said that the tobacco, having been recovered from the body of the ship, (subject to salvage,) was "wreck" within the meaning of this clause. Indeed, if it could be held to fall within the first part of the clause, there would have been no necessity for the subsequent provision that is made for goods not wrecked, but simply damaged; for the clause goes on, after having provided for goods derelict, jetsam, flotsam, and wreck: "Provided also, that, if any such goods be of such sorts as are entitled to the allowance for damage, such allowance shall be made"—clearly contemplating that goods may be the subject of sea-damage under circumstances that would not bring them within the words derelict, jetsam, flotsam, or wreck. And, though tobacco is expressly excepted from this allowance for damage,^(a) still that does not at all weaken the argument which arises from the fact of there being [114] these two descriptions of goods contemplated in the same clause, namely, goods "wrecked," and goods simply "damaged." It therefore seems to me that this tobacco, which has, by the perils of the sea, been considerably damaged, does not, nevertheless, fill the character of goods wrecked; and that our judgment ought to be for the defendant.

MAULE, J. In order to bring the case within the proviso in the 50th section of the act, the goods must have been goods brought or coming into the United Kingdom as *wreck*. It cannot be contended that this tobacco was wrecked, in any other sense than that the *ship* was wrecked: neither can it be contended that the carrying of the goods on shore by the owner, supposing they were not wrecked before, was a wrecking of them. The question, therefore, is, whether they were wrecked in consequence of the wreck of the ship, not whether there was any separate and independent wrecking of the goods. The finding of the jury on this subject is, that, on the 28th of March, 1836, at four o'clock in the morning, whilst the ship was at anchor in Torbay, another vessel ran foul of her, and did her considerable damage; that the master and crew thought it expedient to leave the vessel, and did so, expecting her to go on shore, or possibly to go down; that, at day-break, the master got on board a fishing-smack, which put him ashore about eight o'clock in the

(a) See 3 & 4 W. 4, c. 52, ss. 30, 32.

morning, when, accompanied by the agent to Lloyd's, he proceeded to that part of the coast where he expected to find, and did find, the vessel ashore upon the rocks. The vessel being so found on the rocks, and full of water, the master caused the goods to be taken out and brought on shore: and the vessel was ultimately got off, though considerably damaged. She was afterwards repaired; and, it appears, might have *115] continued her voyage, if the owners had thought *fit: but, instead of so doing, they proceeded to sell her, and she is now upon the register. That does not seem to me to constitute a wreck of the ship. A ship cannot be said to be wrecked merely because she takes the ground and receives such damage as to require repair. This ship, after the disaster, still continues, and is used, as a ship. Now, if there is no wreck of the ship, and none of the goods independently of the wreck of the ship, there is no wreck at all. It is therefore unnecessary to consider any of the other questions in the case, inasmuch as the foundation fails on which the plaintiff must rest his case on the merits, viz., that the tobacco was *wrecked*.

CRESSWELL, J. The first question raised by the special verdict is, whether the plaintiff was entitled to have the tobacco delivered to him on payment of the 5*l.* per cent. ad valorem duty; and that depends on whether or not he is entitled to the benefit of the proviso at the end of the 50th section of the 3 & 4 W. 4, c. 52. The first part of that section enacts, "that all foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to." Then, the proviso at the end is, that "all such goods as cannot be sold for the amount of duty due thereon, shall be delivered over to the lord of the manor, or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and shall be liable to be charged with duty accordingly," that is, with the ad valorem duty of 5*l.* per cent. That proviso applies only to the goods before mentioned—derelict, jetsam, flotsam, and wreck. Now, the goods in question were not derelict; the crew only left the vessel for a few hours, and then resumed possession of her: they were not jetsam, not being thrown overboard to *116] lighten the ship: *nor were they flotsam, abandoned to the waves: neither were they wreck. I quite agree that the word "wreck" may be used in a sense embracing all the other descriptions of loss above referred to, and need not be confined to wreck proper. I think the word, as here used, was intended to supply that which was left defective by the words found in the previous part of the clause—derelict, jetsam, and flotsam. If this tobacco had been found floating on the waters by strangers, and brought on shore, it might have been entitled to the benefit of the proviso. The word "coming" applies to goods brought in by the waves and cast on shore, without an act done

by any one. Here, the tobacco was brought on shore by the servants of the owner. It is quite clear, therefore, that it is not within the protection of the proviso, and, consequently, that this action is not maintainable.

EARLE, J. The plaintiff cannot maintain this action, unless he can establish that the ship was wrecked within the meaning of the act of parliament. At the time when the first damage was done to the ship, the crew imagined it to be more serious than it ultimately turned out to be; they thought the ship was going down, and therefore abandoned her; but in this they were mistaken, for, the vessel floated ashore, and continued whole. Notwithstanding the damage done to her, she was got off, and afterwards sold, as an entire ship, for about one-third of her original value, and repaired by the purchasers. No authority has been, or could be, cited to show, that, under such circumstances as these, the ship was, in contemplation of law, wrecked; and, unless that could be established, the plaintiff could only maintain this action by showing that the goods that had been on board came on shore by means of the sea. That, however, is expressly negatived by the special verdict.

Judgment for the defendant.

*ANN ROBERTS v. TAYLER and Others. Jan. 17. [*117

To a declaration in trespass quare clausum fregit, charging an assault, it is no plea that the close was the soil and freehold of J. S., and that the assault was committed by the command of J. S. in removing the plaintiff, after request, from the premises, without alleging that J. S. was possessed of the close.

TRESPASS. The declaration stated that the defendants, on the 3d of January, 1844, and on divers other days and times between that day and the commencement of the suit, with force and arms, *broke and entered a certain dwelling-house of the plaintiff*, situate, &c., and then made a great noise and disturbance therein, and stayed therein making such noise and disturbance for divers long spaces of time respectively next after the said times when they so broke and entered the said dwelling-house, to wit, for the space of three days next after each of those times: *and also, that the defendants, on the 8th of January, 1844, with force and arms, removed from the said dwelling-house of the plaintiff, divers fixtures and things of the plaintiff then affixed thereto and belonging to the same, to wit, ten stoves, &c., of the value, to wit, of 500*l.*, and then seized, took, and carried away the same, and converted and disposed thereof to their own use: and also, that the defendants, on the 8th of January, 1844, with force and arms, ejected, expelled, put out, and removed the plaintiff from her possession and occupation of her said dwelling-house, and kept and continued her so expelled, &c., up to and at the time of the commencement of the suit, and during that time took, and had and received to the use*

of the defendants, all the issues and profits of the said dwelling-house, being of great yearly value, to wit, of the yearly value of 100*l.*, and caused and procured great damage, deterioration, and injury to the said dwelling-house: *and also, that* the defendants, before the commencement of this suit, to wit, on the 8th of January, 1844, and on divers and other
 *118] days *between that day and the commencement of this suit, and at several times on each of those days, with force and arms, &c., *assaulted the plaintiff*, and then beat, bruised, wounded, *bit*, and ill-treated her; *and also that* the defendants, with force and arms, on the 3d of January, 1844, seized and took divers goods and chattels of the plaintiff, to wit, thirty tables, &c. &c., of great value, to wit, &c., and converted and disposed of the same to their own use, &c.

To this declaration the defendants, (treating it as one consisting of five counts,) amongst other pleas, pleaded, fourthly, as to the whole of the declaration, that *the said dwelling-house* in which, &c., at the said times when, &c. in the declaration mentioned, *was and now is the dwelling-house, soil, and freehold of one Josiah Wilson*; wherefore the defendants, as the servants of Wilson, and by his command in that behalf, at the said times when, &c. in the declaration mentioned, broke and entered the dwelling-house in which, &c., and committed therein the several supposed trespasses in the first count mentioned; and that the fixtures and things in the second count mentioned were at the said time when, &c. parcel of the said dwelling-house and of Wilson's said freehold therein; and that *the plaintiff*, just before and at the said times when, &c. in the said third and fourth counts mentioned, to wit, on the said 8th of January, 1844, *was unlawfully in possession and occupation of the said dwelling-house*, and with force and arms making a great noise and disturbance therein, without the leave or license, and against the will of Wilson, the defendants thereupon, as the servants of Wilson, and by his command in that behalf, then requested the plaintiff to cease making the said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do; whereupon † the defendants,
 *119] as the servants of Wilson, and by his *command, in the defence of his possession of the said dwelling-house, gently laid their hands on the plaintiff in order to eject, expel, put out, and amove, and did then eject, expel, put out, and amove her from her possession and occupation of, and from and out of the said dwelling-house; and because the plaintiff then resisted the defendants in that behalf, and then assaulted the defendants, and used violent and menacing language and gestures towards the defendants, and would then and there have beaten, bruised, wounded, and ill-treated them if they had not defended themselves against the plaintiff, they the defendants, at the said times when, &c., did defend themselves against the plaintiff, and in so doing did necessarily and unavoidably assault the plaintiff, and then a little beat, bruise, wound, bite, and ill-treat her, doing no unnecessary damage to the

plaintiff on the occasions aforesaid; and because the goods and chattels in the said last count mentioned, before and at the said time when, &c., had been wrongfully put and placed, and then were wrongfully, in and upon the said dwelling-house in which, &c., encumbering the same, and doing damage there to Wilson, the defendants, as the servants of Wilson, and by his command in that behalf, at the said time when, &c. in that count mentioned, seized the said goods and chattels, and took and amoved them from the said dwelling-house in which, &c., to a small and convenient distance, and there left the same for the plaintiff's use, and whereof the plaintiff then had notice; which were, &c.—verification.

Eighthly—to the first, third, and subsequent counts—that, long before the plaintiff was possessed of, or had any title, estate, or interest in, the said dwelling-house in which, &c., to wit, on the 31st of March, 1837, Wilson was seized in his demesne as of fee of and in the said dwelling-house in which, &c., and, being so seised, *before the said times [120 when, &c. in the said first, third, and subsequent counts mentioned, or any of them, and before the plaintiff was possessed of or had any estate, interest, or title of, in, or to the said dwelling-house, to wit, on the 31st of March, 1837, by a certain agreement then made between Wilson and the said Robert Roberts,(a) the date whereof, &c., Wilson let to the said R. Roberts, who then took the said dwelling-house in which, &c., as tenant thereof, to Wilson, for one year then next following, and so on from year to year for so long as they should respectively please, &c., at and under the yearly rent of 25*l.*, payable quarterly, on, &c.; and R. Roberts thereby agreed with Wilson to repair, and keep in tenantable repair, the said dwelling-house, during the continuance of the said demise and tenancy; and it was thereby further agreed, that, if R. Roberts should break the said agreement in any respect, or if he did not repair or keep in tenantable repair the said dwelling-house during the continuance of the said demise and tenancy, or if the said rent or any part thereof should be unpaid fourteen days next after any day on which such rent or any quarterly part thereof should become due, then it should be lawful for Wilson to enter on the said dwelling-house without any ejectment or process at law,(b) and to have again and re-possess the same, and all occupiers thereof to expel and remove: by virtue of which agreement and demise, R. Roberts then entered into and upon the said dwelling-house, and became and was possessed thereof for the term and tenancy so to him thereof granted as aforesaid, the reversion of and in the said dwelling-house, then and during all the time thereafter mentioned, being in *Wilson: Averment, that after- [121 wards, and during the continuance of the said demise and tenancy, to wit, on the 25th of December, 1843, and before the said times when, &c., R. Roberts wholly omitted and neglected to, and did not nor

(a) Referred to in a former plea.

(b) This clause is unnecessary, as any person having a right of entry or right of possession may enter without any legal proceedings. See *Butcher v. Butcher*, 1 Mann. & R. 320.

would, repair and keep in tenantable repair the said dwelling-house; and the said dwelling-house was then suffered and permitted to be, and the same then was, in bad and untenable repair, by reason of the same not being repaired and kept in tenantable repair according to the said agreement; that the same continuing in such bad and untenable repair by reason of the premises, thereupon it then, and at the said times when, &c. in the said first, third, and subsequent counts mentioned, became and was lawful for Wilson, under and by virtue of the said agreement, to enter upon the said dwelling-house without any ejectment or process at law, and to have again and re-possess the same, and all occupiers thereof to expel and remove, and the said estate and interest of R. Roberts and all those claiming under him under and by virtue of the said agreement became and was, by means of the premises, forfeited and wholly ended and determined; and thereupon, afterwards, and at the said times when, &c. in the said first, third, and subsequent counts mentioned, the defendants, as servants of Wilson, and by his command in that behalf, for and by reason of the said breach of the said agreement, did, in pursuance and under and by virtue of the said agreement and the said power therein contained, enter into and upon the said dwelling-house, the outer door thereof being open,^(a) and did take possession thereof, and the same again have and re-possess for and on behalf of Wilson, and by his command in that behalf; and, because the plaintiff *122] was unlawfully, at the said times when, &c., *in the occupation and possession of the said dwelling-house without the leave or license and against the will of Wilson, the defendants thereupon, as the servants of Wilson, and by his command in that behalf, then requested the plaintiff to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do; whereupon, &c., as in the fourth plea, from the † in p. 118.

Replication to the fourth plea, so far as related to the first count—that, at th: said times when, &c. in the said first count mentioned, the plaintiff was lawfully possessed of the said dwelling-house in which, &c., and was lawfully entitled to her possession thereof as against the defendants: *without this* that the plaintiff was unlawfully in possession or occupation of the said dwelling-house in which, &c., in manner and form as in the said fourth plea so far as related to the said first count in that behalf was alleged—concluding to the country. There were similar replications to the fourth plea so far as the same related to the second and third counts respectively: and, as to the fourth plea, so far as it related to the last count of the declaration, the plaintiff replied, that, after the defendants seized the goods and chattels in the said last count mentioned, and took and amoved the same in the manner in the said fourth plea in that behalf mentioned, to wit, at the said time when, &c. in the said last count

(a) This allegation is unnecessary, as a person who has a right of possession may break open outer doors.

in that behalf mentioned, the defendants converted and disposed of the said goods and chattels to their own use, in manner and form as in the said last count was alleged—verification.

Replication to the eighth plea, so far as it related to the last count of the declaration—that, after the defendants seized the goods and chattels in the said last count mentioned, and took and amoved the same in the manner in the said last plea in that behalf mentioned, to wit, at the said time when, &c. in the said last count *in that behalf mentioned, [*123 the defendants converted and disposed of the said goods and chattels to their own use, in manner and form as in the said last count was alleged—verification.

To these replications the defendants demurred specially, assigning for causes, as to the replication to so much of the fourth plea as related to the first, second, and third counts—that it did not appear in or by those replications how or why the plaintiff was lawfully possessed of the said dwelling-house; that it should have been therein alleged what right and title the plaintiff had to the possession of the said dwelling-house; that they should have traversed that the dwelling-house in which, &c. was the dwelling-house, soil, and freehold of Wilson, or should have set forth and shown what right or title the plaintiff had therein, showing the facts under which she derived such right or title; that they traversed immaterial matter; that they amounted to argumentative traverses of the defendants having been servants of Wilson, and having acted by his command, as alleged in the plea; and that they put in issue matters of law and matters not properly triable by a jury, namely, whether or not the plaintiff was *unlawfully* in possession or occupation of the said dwelling-house, &c. And, as to the replication as to so much of the fourth plea as related to the last count, and also as to the replication to the eighth plea—that the replication did not sufficiently confess and avoid, or traverse or deny, the matters alleged in the plea; that, if it was meant as a denial of the defendants' having removed the said goods and chattels to a small and convenient distance, and there leaving the same for the use of the plaintiffs, it was an argumentative traverse thereof, and should have concluded to the country, and not with a verification; that, if the replication was meant to confess and avoid the said matter in the plea so far as related to the last *count, it was a departure from [*124 the declaration, inasmuch as it admitted that the action was brought for the purpose in the plea mentioned, and that so much of the plea as related to that count was an answer thereto, and at the same time sought and endeavoured to set up and establish another and different cause of action; that the replication, if it was intended to set up that the defendants were trespassers by or from the original seizing and taking of the goods and chattels, should have shown how they were so; that it was uncertain and ambiguous from the replication, whether the plaintiff intended to rely upon the said seizing and taking of the said

goods and chattels as a cause of action ; that the replication was a new assignment improperly and inartificially pleaded, &c. Joinder.

Channell, Serjt., in support of the demurrers. The fourth and eighth pleas are substantially pleas of liberum tenementum in Josiah Wilson, so far as regards the dwelling-house ; and, in effect, all that the plaintiff says in her replications, is, that she is lawfully possessed, without saying in what manner she is entitled to the possession. It is apprehended she should either have set up title in herself, or have denied that the dwelling-house was the property of the plaintiff, whereas she has admitted the title of Josiah Wilson. These pleas are also pleas of liberum tenementum, well pleaded with respect to the other matters comprised in the declaration ; for, the justification is connected with the dwelling-house.

Talfourd, Serjt., *contrà*. (a) It may be conceded that, had the pleas *125] been simply pleas of liberum tenementum, *the plaintiff must have either denied the title as alleged, or set up title in herself. But here the defendants do not rely on the mere allegation of soil and freehold in Wilson ; they go on to state that the plaintiff was unlawfully in possession of the dwelling-house ; and therefore the plaintiff had a right to take issue on this last-mentioned allegation. [MAULE, J. The allegations in the pleas that the plaintiff was unlawfully in possession are quite idle. The pleas ought to have shown how she was unlawfully in possession. TINDAL, C. J. The plea of liberum tenementum implies that both the freehold and the right to the possession are in the party, otherwise it would be no answer to the declaration. The pleas attempt to justify too much. They are clearly bad, as containing no answer to the assault. MAULE, J. I think the pleas and replications alike bad.]

Channell, Serjt., in reply. It may be that the pleas would have been held bad on special demurrer, as attempting to justify too much. [MAULE, J. The fourth plea admits the assault. How does it justify that assault ? It alleges no possessory right.] It may be that the plea *126] *of liberum tenementum would be no answer to the assault ; but that part of the plea may be taken to apply to so much of the declaration as is in its nature local, and the residue of the plea to the assault and expulsion. On general demurrer, at all events, the plea

(a) The points marked for argument on the part of the plaintiff were :—

“First, that the replications demurred to are good, and that the objections taken by the demurrers are not tenable.

“Secondly, that the fourth plea is bad for not justifying the conversion of the goods alleged in the declaration to have been converted by the defendants to their own use ; and that it is also bad for not sufficiently justifying the biting of the plaintiff alleged in the declaration.

“Thirdly, that the eighth plea is bad, because it does not show that the agreement therein mentioned was under seal, or that it operated in such a manner as to admit of such right of entry as is alleged in the plea, being reserved by it ; and because the plea does not show that Wilson had the reversion at the time of the breach, which was relied on as constituting the forfeiture ; and because it does not appear that the entry made before the committing of the trespasses was made for the purpose of avoiding the lease, or that R. Roberts or his assignees or under-tenants had any notice that it was made for such purpose ; and because it admits one of the trespasses, viz., the first entry therein averred, before any notice given to Roberts or Wilson’s election to determine the lease.”

is sufficient. The eighth plea justifies all but the assault. [CRESSWELL, J. The seisin in fee in Wilson is made the foundation of that plea as well as of the fourth.]

TINDAL, C. J. It appears to me that the eighth plea must follow the fate of the fourth. As to the fourth plea, as the defendants have thought fit to introduce in their justification the seisin in fee in Wilson, the plaintiff has a right to see whether or not it affords a good answer to the assault. This is the first time I ever met with a plea of *liberum tenementum* in an action charging an assault. The ordinary answer to such an action is, that the assault was committed in defence of the defendant's possession. *Libertum tenementum* at the most only *implies* a possession. I think this is clearly a bad plea.

MAULE, J. I am of the same opinion. This is a perfectly unprecedented form of plea.

CRESSWELL, J. I am also of opinion that the fourth plea is bad. In trespass *quare clausum fregit* the possession of the plaintiff is the foundation of the action; and the defendant is considered sufficiently to deny the plaintiff's right of possession by pleading *liberum tenementum* in himself or a third person; in the latter case justifying as the servant and acting by the command of such third person: and by this anomalous plea the plaintiff is put to show how he has a possession in himself consistent with the freehold being in another, unless he chooses to traverse the title set up by the plea. But, where the declaration charges an assault, a defendant *can only justify by alleging possession, [*127 and that the assault was committed in defence of such possession. I am therefore of opinion—that the plaintiff is entitled to judgment upon both demurrers.

EARLE, J. I am also of opinion that the plaintiff is entitled to judgment. The plea of *liberum tenementum* is clearly no justification as to the assault.

Judgment for the plaintiff.

Channell, Serjt., on a subsequent day, having called the attention of the court to the allegation of entry in the eighth plea,

TINDAL, C. J., said: That only shifts the objection to the replication. The eighth plea is pleaded to the first, third, fourth, and fifth counts. In her replication, the plaintiff says, that, after the defendants seized the goods and chattels in the last count mentioned, and took and amoved the same in the manner in the plea mentioned, the defendants converted and disposed of the goods to their own use, as in the last count alleged. We decided for the plaintiff on the fourth plea, because we thought the plea bad, no right of possession being shown; and we also decide for the plaintiff upon the replication to the eighth plea, on the ground that the replication is good; for, as the plea goes to four of the counts, and the replication shows that the defendants were trespassers *ab initio* as to one, it is an answer to the plea.

The rest of the court concurring,

Judgment accordingly.

*128]

*HOWETT v. CLEMENTS.

CLEMENTS v. HOWETT. Jan. 17.

Where an award is sent back to the arbitrator to be amended, he is not bound to give the parties notice to attend him thereon.

By an order of *nisi prius*, bearing date the 27th of November, 1843, made in a cause of *Howett v. Clements*, a verdict was ordered to be entered for the plaintiff, damages 500*l.*, subject to the award of a barrister, who was thereby empowered to direct that a verdict should be entered for the plaintiff or the defendant, as he should think proper, and to whom that cause, and also another cause of *Clements v. Howett*, and all matters in difference between the parties, were referred. The costs of the said suits respectively were to abide the event of the award, and the costs of the reference and award were to be in the discretion of the arbitrator.

The arbitrator made his award on the 1st of May, 1844, as follows:—
 “With respect to the cause first above mentioned, and in which the said James Charles Howett is the plaintiff and the said Benjamin Clements is defendant, I award, order, and adjudge that the verdict already entered up therein for the plaintiff James Charles Howett shall stand, but that the damages shall be reduced to the sum of 45*l.*; and with respect to the other cause, in which the said Benjamin Clements is the plaintiff and the said James Charles Howett is defendant, I award, order, and adjudge” *that a verdict shall be entered for the defendant James Charles Howett*; and I find that there are no further or other matters in difference between the said parties besides or in addition to the said causes in the said order of reference and hereinbefore mentioned; and I further order and award that the costs of this reference and of this my award shall be paid by the said Benjamin Clements.”

*129] A rule *nisi* having been obtained on behalf of Clements, to set aside the above award, on the ground that the arbitrator had, by mistake, called the plaintiff in the first-mentioned action *James Charles Howett*, instead of *Joseph Charles Howett*, the court, on the 23d of November last, after hearing counsel, ordered, “that the award of the arbitrator in the said rule mentioned be referred back to the said arbitrator to reconsider and amend the same if he should think fit.” In pursuance of this rule the arbitrator, on the 2d of December last, made the following endorsement on the back of the award:—“In pursuance of an order of the Court of Common Pleas of the 23d November last, I, the within-named arbitrator, have reconsidered this my award; and I do hereby certify and declare that the same ought to be amended by substituting the name *Joseph Charles Howett* for the name *James Charles Howett*, wherever such name occurs in the said award, and that the said award ought now to be read as if the name *Joseph Charles Howett*

had originally stood therein instead of the name *James Charles Howett* in every instance where such name occurs in the said award, the name *James Charles Howett* having been therein inserted by mistake instead of the name *Joseph Charles Howett*, and *Joseph Charles Howett* being the person thereby meant and intended by me."

The arbitrator further altered his award by inserting at the asterisk the following words:—"that the defendant therein is not guilty of the grievances therein laid to his charge, or of any or either of them, or of any part thereof, and"—which words he, by a note in the margin, awarded and directed should stand as part of his award.

Manning, Serjt., now moved to set aside the award, on the ground that the arbitrator had improperly directed a *verdict* to be entered in the second action, the order *giving him no power so to do; *Hutchinson v. Blackwell*, 8 Bingh. 331, 1 M. & Scott, 513. [MAULE, J. [*130 There undoubtedly could not be a formal verdict entered in the condition in which the second cause stood: the arbitrator has used the word in its popular sense. CRESSWELL, J. This objection existed at the time the first motion was made to set aside the award, and was not then urged; it is now too late to raise it. MAULE, J. There was some colour for the objection when the first application was made; but it is now removed.] The party has until the end of the term succeeding the amendment to move to set aside the award; *Moore v. Bullin*, 7 Ad. & E. 595, 2 N. & P. 436. [TINDAL, C. J. The direction as to the verdict is simply useless; the issue is determined.]

The learned serjeant then produced an affidavit stating that no notice had been given to Clements or his attorney to attend the arbitrator on his reconsidering or amending his award; nor did he, Clements, or any person on his behalf, attend the arbitrator on his so reconsidering or amending his award. This, he submitted, Clements was entitled to do.

TINDAL, C. J. The arbitrator was not bound to give notice to the parties. The award was sent back to him for a specific purpose. He needed no assistance from either side.

MAULE, J. If the award is open to the objection suggested, the party is not without remedy; he may avail himself of it as a defence to an action upon the award.

The rest of the court concurring,

Rule refused.

*HEMSWORTH v. BRIAN. Jan. 18.

[*131

An affidavit with a jurat stating it to have been "sworn at the judges' chambers, Serjeants' Inn, Chancery Lane, in the county of Middlesex, is sufficient.

A cause and all matters in difference between the parties were referred to a lay arbitrator, the costs of the cause and of the reference and award to abide the result of the award. The arbitrator by his award found that the plaintiff had no cause of action as to the first count; and that, as to the second, third, and fourth counts, the defendant was indebted to the plain-

tiff in 68*l.* 9*s.* 7*d.*; but that the plaintiff was indebted to the defendant upon the whole matters referred (including the above sum) in 17*l.* 7*s.* 5*d.*:—*Held*, that he was not bound to give any direction as to costs.

Bankruptcy is no revocation of a submission to arbitration.

The award directed, amongst other things, that the plaintiff should, on a given day, deliver up to the defendant a *warrant* for a hogshead of port wine lying at the London Docks, describing it by its number and marks: the demand required the plaintiff to deliver up "*one hogshead of port wine*," describing it:—*Held*, that this was not a sufficient demand to support an attachment.

By a judge's order, (afterwards made a rule of court,) dated the 23d of May, 1843, and made in a cause wherein H. W. Hemsworth was plaintiff, and T. H. Brian defendant, it was ordered that the cause and all other matters in difference between the parties should be referred to J. S., (a layman,) the costs of the said cause and of the reference and award to abide *the result of the award*.

J. S., on the 23d of March, 1844, made his award as follows:—"I do find, award, and determine, that, at the time of commencing the said action, the plaintiff had not any cause of action for or in respect of the several matters and things respectively mentioned and contained or referred to in the first count in the pleadings in the said cause contained; and that, in case the trial in the said cause had proceeded, the issue joined on, or in respect of, the said count, should and ought to have been found for the defendant: And I further find, award, and determine, that, on the 2d of March, 1843, and at the time of the commencement of the said action, the defendant was indebted to the plaintiff in the sum of 68*l.* 9*s.* 7*d.* on the second, third, and fourth counts in the said declaration mentioned; and that, in case the trial *in the said cause
*132] had proceeded, the issues joined on the second, third, and fourth counts in the said pleadings contained should and ought to have been found for the plaintiff: And I further find, award, and determine, that, on an account taken of all matters referred to me by the said recited order, (including the said sum of 68*l.* 9*s.* 7*d.*.) the plaintiff was, at the date of the said order, and still is, indebted to the defendant in the sum of 17*l.* 7*s.* 5*d.*: And I further award, order, and direct that the said H. W. Hemsworth shall, on the 1st of April next, at, &c., pay unto the said T. H. Brian, or his attorneys, for the use of the said T. H. Brian, the sum of 17*l.* 7*s.* 5*d.*: And I further award, order, and direct that the said H. W. Hemsworth shall, on the 30th of March instant, deliver up unto the said T. H. Brian, his executors, administrators, or assigns, the following *warrants* of wines and brandy, namely, a *warrant* for one hogshead of port wine, numbered 2260, now or lately lying in the East Vault, London Docks, and marked B. No. 2, &c. &c. [here followed a description by marks and numbers of several casks of wine and one hogshead of brandy:] And I further find that the said H. W. Hemsworth is in possession of certain wines in bottle, the property of the said T. H. Brian, consisting of, &c. &c.: And I further award, order, and direct that the said H. W. Hemsworth shall, on the 30th of March instant, deliver up

all the said wines in bottle to the said T. H. Brian, or his servants or agents authorized by writing under his hand to receive the same: And I further award, order, and direct, that, if default be made by the said H. W. Hemsworth, his executors, administrators, or assigns, in payment of the said sum of 17*l.* 7*s.* 5*d.*, to the said T. H. Brian, his executors, administrators, or assigns, or to his said attorneys, at the time in that behalf herein by me appointed, or if the said H. W. Hemsworth, his executors, &c., shall not, on the 30th day of March *instant, deliver [*133 up to the said T. H. Brian, his executors, &c., the said *wine-warrants* and brandy-warrant, and the said wines in bottle, hereinbefore directed by me to be delivered up, then and in either of the said cases, after making this my award a rule of Her Majesty's court of Common Pleas, the said T. H. Brian may immediately proceed by attachment or otherwise (a) for the recovery of the said sum of 17*l.* 7*s.* 5*d.*, and of the possession of the said *wine-warrants* and brandy-warrant and wines in bottle, or either of them, as the case may require: And I further award, order, and determine that the said H. W. Hemsworth shall take to, retain, and keep four butts of sherry wine, &c. &c., which articles and things were formerly the property of the said T. H. Brian, and are now, or lately were, in the possession of the said H. W. Hemsworth, &c.: And I lastly award, order, and determine, that, after the due performance of this my award, and the payment of the costs of the said cause, and of the said reference and of this my award, they the said H. W. Hemsworth and T. H. Brian, and their respective executors or administrators, shall respectively within ten days after the same shall have been respectively tendered to him or them for execution, and at the costs and charges of the party requiring the same, sign, seal, and as their respective acts and deeds deliver, each of them, his executors or administrators, unto the other of them, his executors or administrators, mutual general releases, in writing, of all and all manner of actions and suits, claims and demands whatsoever, from the beginning of the world up to the day of the date of the said order of reference."

Telford, Serjt., obtained a rule nisi for an attachment against the plaintiff for non-performance of the above *award. The affidavit [*134 upon which the rule was obtained stated that the deponent did, "on the 8th of November instant, personally serve H. W. Hemsworth, the above-named plaintiff, with a true copy of the said award, and also a true copy of the rule of court, and the master's allocatur thereon, and, at the same time showed him, the said H. W. Hemsworth, the said original award, and the said original rule and allocatur thereon; and that the deponent then demanded of the said H. W. Hemsworth the sum of 17*l.* 7*s.* 5*d.*, awarded to him the deponent in and by the said award, as also the sum of 68*l.* 11*s.*, the costs allowed by the said master in and by the said allocatur; and that the deponent did, at the same time, demand of

the said H. W. Hemsworth *one hogshead of port wine*, numbered 260, then or then lately lying in the East Vault, London Docks, and marked B. No. 2, a *warrant* for one hogshead of sherry, &c. &c., directed by the said award to be delivered up by the said H. W. Hemsworth to the deponent; but that the said H. W. Hemsworth did not then, or at any time since, pay the sums of 17*l.* 7*s.* 5*d.*, and 68*l.* 11*s.*, or either of them, or any part thereof, to the deponent, or to any person on his behalf; nor did the said H. W. Hemsworth then, or at any time since, deliver up the said *warrants and wines*, or any of them, or any part thereof, to the deponent, or to any person on his behalf."

The jurat to the above affidavit was as follows:—"Sworn, at the judges' chambers, Serjeants' Inn, Chancery Lane, in the county of Middlesex, this 9th day of November, 1844. C. CRESSWELL."

Channell, Serjt., now showed cause. He took a preliminary objection to the affidavit of demand, viz., that the jurat was defective, inasmuch as the judges' chambers are not situate in Serjeants' Inn, neither is Serjeants' Inn in the county of Middlesex. In support of this *ob-
 *135] jection he produced an affidavit made by Mr. Gibbs, Mr. Justice CRESSWELL's clerk, and by the plaintiff's attorney—the former of whom deposed that he had inspected an affidavit sworn in this cause by a person purporting to be the defendant, on the 9th of November last, and filed, &c., and that the said person purporting to be the defendant was sworn to the truth of the aforesaid affidavit by the deponent on the said 9th of November last, at the chambers of CRESSWELL, J., situate in Rolls Garden, Chancery Lane: and the latter, that the usual form of jurat attached to affidavits sworn at chambers, and that which is placed up in the said chambers of the judges of this court, as the form to be adopted by persons swearing affidavits there, is as follows:—"Sworn at my chambers, Rolls Garden, Chancery Lane, this — day of —, before me."

Talfourd, Serjt., referred to *The Queen v. Townsend*,^(a) where, upon an indictment for perjury, the jury found that the judges' chambers were in the county of Middlesex, and the prisoner was convicted.^(b)

Per curiam: (c) Proceed to the merits.

Channell, Serjt. The award is bad. The reference is of the cause as well as of all matters in difference. The arbitrator finds, that, at the commencement of the action, the plaintiff had not any cause of action for or in respect of the several matters and things in the first count, and that, if the cause had proceeded to trial, the issue joined thereon ought to have been found for the defendant: but, as to the second, third, and
 *136] fourth counts, he finds that the defendant was indebted to the *plaintiff in the sum of 68*l.* 9*s.* 7*d.*, and that if the cause had proceeded to trial, the issues on these counts should have been found for the

(a) Not reported.

(b) The judges' chambers are built upon ground which formerly was part of the Rolls Garden, but which has ceased to be so, and now forms part of Serjeants' Inn.

(c) *Tindal*, C. J., was absent.

plaintiff. He has, however, given no direction as to the costs of the cause.

MAULE, J. By the order of reference, *all* the costs are to abide *the result of the award*. The parties had disputed accounts between them, and the substance of the order is, a reference of those accounts to the arbitrator, the costs to follow the balance. *The result* means the final determination of the whole matters in dispute, which were to result in a balance one way or the other. The arbitrator finds, that, on an account taken of all matters referred to him, (including the 68*l.* 9*s.* 7*d.*, which he had found to be due to the plaintiff on the second, third and fourth counts,) the plaintiff was at the date of the order, and still was, indebted to the defendant in the sum of 17*l.* 7*s.* 5*d.* He was not, I think, called upon to give any specific direction as to the costs.

CRESSWELL, J. Suppose there are several accounts between two merchants, and they agree that the whole accounts shall be referred to an arbitrator, the costs to abide the result, and the arbitrator finds the balance upon some of the accounts in favour of A., and upon others in favour of B., but the final balance of the whole accounts in favour of B.; what would be the result of the award? Is not that virtually this case?

Channell, Serjt., then produced an affidavit made by Hemsworth stating that, on the 16th of March, 1844, a docket was struck against him and a fiat opened, which was yet pending; that, after the docket was struck, his solicitor ceased to act for him; that Brian, in August last, attempted to prove his claim under the award against the deponent's estate, when it was objected by the solicitor to the fiat, that he could not do so, the *award bearing date subsequently to the date of the fiat;(a) and [*137 that the commissioner thought the objection valid, but afterwards stated that he would go into the merits if Brian thought fit, which the latter consented to do, and forthwith proceeded to attempt to prove the items of his claim against the deponent's estate; that finally the commissioner refused to allow him to prove, observing that the arbitrator had, in his opinion, made an unjustifiable award. The affidavit further stated, that, after the fiat against the deponent had been opened, the messenger of the court of bankruptcy took possession of all the property and effects of the deponent, situate, &c.; and that the said messenger "did seize and take possession of all the goods and chattels mentioned in the award of the said arbitrator, and directed to be delivered up by the deponent to the defendant, with the exception of the warrants mentioned in the said award, the same being in the possession of the Commercial Bank of London at the time of the deponent's bankruptcy, and held by the said bank for money claimed as due by the deponent to the said bank; and that the said assignees also claimed their right to the said warrants after the supposed claim of the bank was satisfied; and that the assignees still retained the said goods and chattels, except the warrants as aforesaid, or

(a) See *Ex parte Kemhead*, 1 Rose, 149.

had disposed thereof for the benefit of the creditors; and that, in consequence of such seizure, the deponent was not in a situation to comply with the order and award of the said arbitrator in that respect, nor was he, by reason of the said fiat issuing against him, able to pay the amount awarded to be paid by the deponent.

The learned serjeant submitted that the bankruptcy of the plaintiff operated a revocation of the submission; *Marsh v. Wood*, 9 B. & C. 659, *138] 4 M. & R. 504; though this court, in the subsequent *case of *Taylor v. Shuttleworth*, 6 N. C. 277, 8 Scott, 565, upon a different state of circumstances, decided otherwise; and that, at all events, this was not, under the circumstances disclosed in the affidavit of Hemsworth, a case in which an attachment ought to issue against him.

MAULE, J. I see no reason why the bankruptcy of either party should be held to operate a revocation of the submission; and the decisions are numerous to show that it does *not* so operate. Two persons think fit to refer their differences to the determination of an arbitrator: one of them afterwards becomes bankrupt. I do not see why a revocation of the submission should therefore be imposed upon them, when possibly neither party wishes to revoke. Nor do I see any thing in the circumstances to take this case out of the ordinary rule.

Channell, Serjt. Then, as to one part of it, the demand was insufficient. The award directs, amongst other things, that Hemsworth shall, on a given day, deliver up to Brian, his executors, &c., "a *warrant* for one hogshead of port wine, numbered 2260, now or lately lying in the East Vault, London Docks, and marked B. No. 2;" whereas the demand, as to that, is of "*one hogshead of port wine*, numbered 2260, now or lately lying in the East Vault, London Docks, and marked B. No. 2." [MAULE, J. Is not a demand of the hogshead by its marks and number a sufficient demand of the warrant? Brian could not get the wine without the warrant. If Hemsworth had delivered the warrant, would not that have been a sufficient delivery of the wine?] Clearly not. The demand of the wine, instead of a demand of the wine-warrant, would impose upon *139] *Hemsworth the payment of dock dues and rent, which the award does not authorize.(a)

MAULE, J. As to the hogshead of port wine, the demand is not sufficient. The observation as to the dock dues shows that this objection must prevail. The rule may go as to all but that one hogshead.

The rest of the court concurring,

Rule absolute accordingly.

(a) *Vide Roakeby's case*, Clayton, 122, pl. 114, *Thompson v. Shirley*, 1 Esp. N. P. C. 31.

THOMAS v. DUNN. Jan. 21.

A verdict having been found for the defendant, the plaintiff obtained a rule nisi for a new trial, but the defendant having died since the trial, the rule was drawn up calling upon "his legal representatives, or their attorneys," to show cause, and it was served upon the latter:—*Held*, that cause might be shown against the rule by counsel instructed by the attorneys acting for the executors named in the will, though there had been no probate.

ASSUMPSIT upon an agreement to employ the plaintiff as agent in the conduct of a public exhibition.(a) The defendant pleaded non assumpsit and two other pleas, upon which issue was joined.

At the trial before TINDAL, C. J., at the sittings at Westminster after Trinity term last, the jury returned a verdict for the defendant upon the first issue, and for the plaintiff upon the second and third.

In Michaelmas term the plaintiff (in person) obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence, and also upon "affidavits of surprise. The defendant [140 having died before the rule was moved for, it was, at the plaintiff's instance, drawn up calling on "the legal representatives of the defendant, or their attorneys," to show cause: and it was served upon the attorneys, who were authorized to accept service of the rule, and to appear in opposition to it, on behalf of two individuals who were appointed executors under a will duly executed by the defendant. On the rule coming on for argument,

Thomas (in person) objected, on the authority of *Shoman v. Allen*, 1 Mann. & Gr. 96, n., that, inasmuch as the will of the defendant had not been proved, nor any letters of administration taken out, there was no person authorized to appear in opposition to the rule.

Shee and *Byles*, Serjts., who were instructed by the attorneys for the parties appointed executors under the defendant's will, submitted that proof of the will was not necessary to entitle the executors to be heard. To this, however, the court did not assent. They then insisted, that, as the plaintiff had, by the rule, called upon the legal representatives, or their attorneys, to show cause, unless they could be heard, there had been no due service of the rule.

TINDAL, C. J. *Shoman v. Allen* is not in point. In that case there was no person who could be served with the rule: here there was.

The plaintiff was then called upon to support his rule, which eventually was

Discharged.

(a) See the pleadings, 6 Mann. & Gr. 274.

*141] *NEWTON v. HOLFORD and Others. Jan. 21.

In trespass and false imprisonment by A. against B. and C., each of the defendants pleaded, separately, not guilty, and a justification under a judgment and *ca. sa.* against A., at B's suit; to this last plea A. replied, that he was in his dwelling-house, the outer door thereof being closed and fastened, and that B. and C. unlawfully and with force and arms and with a strong hand forced and broke open the said outer door, and so entered for the purpose of arresting, and did arrest him under colour of the writ. B. rejoined, that he did not force or break open the said outer door, &c.: the jury having found for B. on the first issue, and for A. on the second, and for A. against C. on both issues:—*Held*, that the right of B. to the general costs of the cause was not affected by the finding on the second issue against him.

TRESPASS and false imprisonment against Robert Stayner Holford, four others, and Edward Healy.

The first five defendants jointly pleaded not guilty, and a justification of the imprisonment under a writ of *ca. sa.* upon a judgment in the Exchequer against the plaintiff at the suit of the defendant Healy.

The defendant Healy pleaded separately—first, not guilty; secondly, as to the assaulting the plaintiff, and seizing and laying hold of him, and pulling and dragging him about, as in the declaration mentioned, and forcing and compelling him to go from and out of the said dwelling-house in the declaration mentioned into the said public streets and highways, and forcing and compelling him to go in the said carriage in the declaration mentioned, into and along the said public streets and highways to the said prison in the declaration mentioned, and there imprisoning the plaintiff, and keeping and detaining him in prison for the said space of time in the declaration mentioned, as therein mentioned and above alleged to have been done by the defendant Healy; a justification under the said writ of *ca. sa.* upon a judgment recovered by him against the plaintiff i. the Court of Exchequer.

The plaintiff joined issue on the first plea of all the defendants, and replied to the second as follows:—and as to the plea of the defendant *142] Healy by him secondly *above pleaded, (a) the plaintiff saith, that, before and at the time of the said laying hands upon the plaintiff and of the arresting him as in that plea mentioned, and before and at the time of the forcing and breaking open the outer door of, and entering into, the said dwelling-house as hereinafter mentioned, to wit, on the said 5th of July, 1843, the plaintiff was and continued in that dwelling-house, the same being the dwelling-house of the plaintiff in which he the plaintiff at the said time when, &c., dwelt and resided, and before and at the time of the forcing and breaking open the outer door of the said dwelling-house hereinafter mentioned to have been forced and broken open, the said outer door was closed and fastened and not open, and being so closed and fastened and not open, the defendant Healy and the said other defendants, to wit, on the day and year last aforesaid, wrongfully and unlawfully, with force and arms, and with a

(a) The replication to the second plea of the other defendants was similar to this

strong hand, forced and broke open the said outer door, and entered through the same when so forced and broken open into the said dwelling-house, for the purpose of laying hands upon and arresting the plaintiff under colour of the said writ in the said second plea mentioned, and by that wrongful and unlawful breaking and entry, and not otherwise, the said Edward Healy with the said other defendants entered into the said dwelling-house, and, so being in the same, then and there, together with the other said defendants, laid his hands upon the plaintiff, and took and arrested him under colour of the said writ as in the said second plea mentioned; and so the plaintiff says that the said Edward Healy, together with the other said defendants, by means of the said unlawful forcing and breaking open the said outer door, and entering into the said dwelling-house, and not otherwise, did then lay hands on the plaintiff *and arrest him under colour of the said writ; and [*143 other wrongs to the plaintiff the defendant Healy then did as in the declaration mentioned—verification.

Rejoinder, that the defendant Healy and the other said defendants did not force or break open the said outer door of the said dwelling-house in the replication mentioned, in manner and form as the plaintiff had above in his said replication in that behalf alleged—concluding to the country.

The cause was tried before CRESSWELL, J., at the sittings at Westminster after last Trinity term, when a verdict was found for the plaintiff against the defendants Holford, Wilson, Moltham, Turner, and Vines, with 50*l.* damages. A verdict was also found against the defendant Healy upon the justification, but *for* him upon the issue on not guilty.

On the taxation of costs the master allowed the plaintiff costs to the same extent as though there had been a general verdict against all the defendants, without making any deduction on account of the verdict being for the defendant Healy on not guilty; and he allowed Healy 20*s.* as the costs of the issue found for him.

Tufourd, Serjt., on behalf of Healy, on a former day in this term, obtained a rule nisi for the master to review his taxation. He claimed the general costs of the cause.

Newton now showed cause. The master has properly decided that Healy was not entitled to the general costs of the cause, but was entitled only to such deduction as the master could make under the 74th rule of H. T. 2 W. 4. There was no proof of any expense incurred by him that was applicable exclusively to the issue on not guilty. [TINDAL, C. J. Healy is an acquitted defendant, and, as such, is entitled to the costs of the cause. Suppose he *had pleaded not guilty only, there [*144 could have been no doubt; and why, because he has pleaded another plea, upon which he has failed, is he to be in a worse position, except as regards the costs of that issue?] The statutes 8 & 9 W. 3, c. 11, s. 1, and 3 & 4 W. 4, c. 42, s. 32, give, substantially in the same

language, his reasonable costs to an acquitted defendant. But, what reasonable ground can there be for allowing this defendant his costs, when the jury have found that he did all the acts that are charged against him as well as against all the other defendants? That the replication does not, like a new assignment, abandon the trespasses charged in the declaration, is clear from *Calvert v. Gordon*, 7 B. & C. 809, 1 M. & R. 497; *Moore v. Taylor*, 5 Taunt. 69; *Lucas v. Nockells*, 4 Bingh. 729, 1 M. & P. 783, and *House v. The Thames Commissioners*, 3 Brod. & B. 117, 6 J. B. Moore, 324. [TINDAL, C. J. In *Spencer v. Hamerton*, 4 Ad. & E. 413, 6 N. & M. 22, it was held, that, where several pleas are pleaded under the statute 4 Anne, c. 16, and one party obtains a verdict on some of the issues, entitling him to the general costs of the cause, he is liable to pay the opposite party on the issues found for him, not only his costs of the pleadings, but his costs of preparing evidence on those issues; and that the law in this respect is not altered by the 74th rule of Hilary Term 2 W. 4. I cannot distinguish that case from this.] The peculiar form of the issue here materially distinguishes that case from the present. In *Holroyd v. Breare*, 4 B. & Ald. 43, in trespass two defendants appeared by the same attorney, and pleaded, first, the general issue; secondly, separate justifications. A. obtained a verdict generally; and B. obtained a verdict on his justification, but the plaintiff succeeded against him on the general issue; and it was held that B. was not entitled to any costs on the *issue found for him. So, in *Broadbent v. Shaw*, 2 B. & Ad. 940, in trespass for breaking and entering the plaintiff's close, &c., the defendants pleaded, first, not guilty; secondly, a right of way; the replication joined issue on the plea of not guilty, traversed the right of way, and new assigned; the defendants joined issue on the right of way, and suffered judgment by default as to the new assignment: the jury having found a verdict for the defendants on the special plea, and assessed the damages at 1s. on the new assignment, it was held that the defendants, not having withdrawn the plea of not guilty, were not entitled to the general costs of the cause. It is quite clear, therefore, that Healy cannot be entitled to the costs of the cause.

Talfourd, Serjt., contra, was stopped by the court.

TINDAL, C. J. If I had felt any doubt in this case, I should have been desirous of having the matter more fully discussed. But, upon general principles, as well as upon the authority of *Spencer v. Hamerton*, to which I have already adverted, it appears to me that the rule for reviewing the taxation ought to be made absolute. The plaintiff, in his declaration, complains of an assault and false imprisonment committed against him by several defendants. One of them, severing himself from the others, pleads, first, not guilty—that he is not guilty of the assault and false imprisonment charged in the declaration; and upon that issue the jury have found a verdict for that one defendant. Had it rested there, the defend-

ant would, beyond doubt, have been entitled to the costs of the cause. But, in addition to his plea of not guilty, he has put upon the record a special plea *admitting all the trespasses charged in the declaration, but justifying them under a writ and judgment. The [*146 plaintiff, by his replication, without abandoning the trespasses charged in the declaration, goes on to state a collateral fact, viz., that, he being in his dwelling-house, the outer door being closed, the defendants broke the outer door for the purpose of getting at him to execute the writ. To this the defendant rejoins that he did not force or break open the said outer door of the said dwelling-house in the replication mentioned, in manner and form as the plaintiff had in his replication in that behalf alleged: and upon that the parties go to issue, and the jury find that the defendant did force and break open the outer door in manner and form as alleged. The plaintiff's contention is, that the finding of the jury upon this issue is to be taken into account in considering the effect of the general issue. Upon principle, however, I think otherwise. Each plea must stand alone. The plea of not guilty is to be taken as if the special plea had not been pleaded at all. I cannot understand why the finding of the jury on the special plea should put the plaintiff in any better situation as regards the issue on not guilty, than that in which he would have stood had not guilty alone been pleaded. If it be true that the several pleas are to be kept separate and distinct, the plaintiff can have no right to pray in aid the contradiction apparent on the record, to prevent the legal consequence of that rule from taking effect. And this, I think, is completely made out by the case of *Spencer v. Hamerton*, which must govern the present.

MAULE, J. I also am of opinion that this rule must be made absolute. Where there are several defendants, and one of them is entitled to judgment that he go without day, he is entitled to the general costs of the cause. *Here, there were two issues. The one was, whether [*147 or not Healy had done the acts complained of in the declaration: the jury found that he had not. The other issue was, in effect, this: whether, for the purpose of executing a certain writ of *capias ad satisfaciendum*, the persons who executed it (and it is immaterial with respect to the first issue who those persons were) broke the outer door. The jury found that they did. The result of the finding is this, that, when the writ was executed, the outer door was broken, but that the defendant Healy had nothing to do with the assault and false imprisonment mentioned in the declaration. On that state of the pleadings, and on that finding, Healy is entitled to go without day in respect of the trespasses charged in the declaration. But, inasmuch as he has caused an inquiry to be had before the jury as to the breaking of the outer door, and has failed on that, he is bound to pay the costs of that issue to the plaintiff. The general costs will, of course, be properly taxed.

CRESSWELL, J. I am entirely of the same opinion. Had the defend-

ant Healy simply pleaded the general issue, and obtained a verdict thereon, there would have been no doubt about the result. But he has also pleaded a special plea. It is true that by that special plea he admits that he was a party to the transaction alluded to in the declaration; but he admits it for the purpose of that issue only. Upon the whole record he is not guilty. With respect to the matter arising out of the special plea he is found to have been guilty. But that does not get rid of the finding in his favour upon the issue on not guilty. I think Healy is entitled to have the general costs of the cause taxed for him, and that he must pay the costs of the issue upon which he has failed.

*148] *EARLE, J. I am of the same opinion. The question is, which party is entitled to the general costs of the cause. Where a defendant succeeds upon an issue that goes entirely to defeat the plaintiff, he is entitled to the general costs. Here, the defendant has succeeded upon not guilty. But there is upon the record a special plea upon the issue arising out of which the defendant has failed. The question is, whether, upon the whole record, the plaintiff has made out his claim to recover damages as against the defendant Healy. In this he clearly has failed. He therefore loses the general costs of the cause. But he is entitled to the costs of the issue upon which he has been successful.

Rule absolute.

STOCKER v. WARNER and Others. Jan. 22.

To a declaration in case by A. against B., for the infringement of a patent for "improvements in pumps," setting out the grant of the letters patent to A. in 1837, and a disclaimer of part of the specification in 1844, and charging a subsequent making and vending, &c. of A.'s invention by B., B. pleaded, that, after the making of the letters patent, and before the disclaimer, C. obtained a patent for "improvements in water-closets and stuffing-boxes applicable to pumps and cocks;" that, after the grant of the letters patent to C., and before A.'s disclaimer, C. granted a license to B. to make, use, &c. his invention, so far as the same was applicable to stuffing-boxes applicable to pumps; that B. had made and sold divers large quantities of pumps under the said license, and that the grievances in the declaration were the making, using, &c., as aforesaid, the said improvements in pumps, for which the said letters patent were granted to C., and the said license granted to B.:—*Held*, that the plea was bad for not sufficiently confessing and avoiding the matters charged in the declaration. *Querr*, the effect of a disclaimer of part of a specification, upon rights acquired under a patent granted to another person previously to the entry of such disclaimer.

CASE for infringement of a patent right. The declaration stated that the plaintiff, before and at the time of the making and obtaining of the letters patent, and of the committing of the grievances by the

*149] *defendants, as thereafter mentioned, was the true and first inventor of so much of certain *improvements in pumps* mentioned in the letters patent thereafter stated, as was not thereafter mentioned to have been disclaimed by him; and thereupon our late lord, King William the Fourth, on the 4th of March, in the seventh year of his reign, by his letters patent, bearing date, &c., under the Great Seal of Great

Britain, (profert,) after reciting that the plaintiff had, by his petition, humbly represented to his said majesty that he had invented *improvements in pumps*, that he was the first and true inventor thereof, and that the same had never been practised by any other person or persons whatsoever, to his knowledge or belief; the plaintiff therefore most humbly prayed that his said majesty would be graciously pleased to grant unto him, his executors, administrators, and assigns, his royal letters patent under the Great Seal of Great Britain, for the sole use, benefit, and advantage of the said invention within England, Wales, and the town of Berwick-upon-Tweed, for the term of fourteen years, pursuant to the statute in that case made and provided; and that his majesty, being willing to give encouragement to all arts and inventions which might be for the public good, was graciously pleased to condescend to the plaintiff's request, &c. &c. [The declaration then set out the grant by the letters patent, in the usual form:] And by the said letters patent it was, amongst other things, provided and declared that the same letters patent were upon the express condition, that, if the plaintiff should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in his said majesty's High Court of Chancery, within six calendar months next and immediately after the date of the said letters patent, that then the said letters patent, and all liberties and advantages whatsoever [150] thereby granted, should utterly cease, determine, and become void, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding: provided that nothing therein contained should prevent the granting of licenses in such manner, and for such considerations, as they might by law be granted: and lastly his majesty did thereby, for himself, his heirs and successors, grant unto the plaintiff, his executors, administrators, and assigns, that those letters patent, or the enrolment or exemplification thereof, should be, in and by all things, good, firm, valid, sufficient, and effectual in the law, according to the true intent and meaning thereof, and should be taken, construed, and adjudged in the most favourable and beneficial sense for the best advantage of the plaintiff, his executors, &c., as well in all his majesty's courts of record as elsewhere, and by all and singular the officers and ministers whatsoever of his majesty, his heirs and successors, in that part of the United Kingdom of Great Britain and Ireland called England, his dominion of Wales, and town of Berwick-upon-Tweed aforesaid, and amongst all and every the subjects of his majesty, his heirs and successors, whatsoever and wheresoever, notwithstanding the not full and certain describing the nature or quality of the said invention, or of the materials thereto conducing and belonging, *prout patet*, &c. Averment: that the plaintiff did afterwards, to wit, on the 4th of September, 1837, in pursuance of the said proviso and of the said letters

patent, by an instrument in writing, to wit, a specification under his hand and seal, particularly describe and ascertain the nature of the said invention in the said letters patent mentioned, and in what manner the same was to be and might be performed, and afterwards, and within six calendar months next and immediately after the date of the

*151] said letters patent, to wit, on the day *and year last aforesaid, did cause the said instrument to be enrolled in the said high court of Chancery, at Westminster, in the county of Middlesex, *prout patet*: that afterwards, and before the committing of any of the grievances by the defendants thereafter mentioned, and after the passing of a certain act of parliament made and passed in the session of parliament held in the 5th & 6th years of the reign of William IV., intitled "An act to amend the law touching letters patent for inventions," to wit, on the 1st of March, 1844, the plaintiff, pursuant to the said statute, and by and with the leave of Sir F. Pollock, knight, her present majesty's then Attorney-General, first had and obtained for that purpose, and duly certified by his fiat and signature in that behalf, entered with the clerk of the patents of England, a disclaimer of part of the said specification which had been so executed and enrolled by the plaintiff as aforesaid, and also a memorandum of alteration of part of the said specification, and of the title of the invention in the said letters patent mentioned; which disclaimer and memorandum of alteration were in writing under the hand and seal of the plaintiff, and bore date, to wit, the day and year last aforesaid; and the plaintiff did therein and thereby state the reason of the said disclaimer and alteration, pursuant to the said statute; and the said disclaimer and memorandum of alteration did not extend the exclusive right granted by the said letters patent; and which disclaimer and memorandum of alteration were afterwards, to wit, on the 5th of March in the year last aforesaid, filed by the said clerk of the patents and enrolled with the said specification, according to the form and by virtue of the said statute; as by the record of the said specification and disclaimer and memorandum of alteration, remaining of record in the said High Court of Chancery, fully appeared: that the title of the

*152] said invention, as altered by the said *disclaimer and memorandum of alteration, was and is as follows, that is to say, "Improvements in fixed lift-pumps:" that the plaintiff had always, from the time of the making and executing of the said letters patent, by himself, his deputies, servants, and agents in that behalf, made, used, and exercised and vended the said invention, to his great advantage and profit: yet the defendant, well knowing the premises, but contriving and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he might, and otherwise would, have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters patent, and after the entering, filing, and enrolling of the said disclaimer and memo-

mandum of alteration as aforesaid, and within the term of fourteen years in the said letters patent mentioned, to wit, on the 6th of March, 1844, and on divers other days, &c., and within that part of the said United Kingdom called England, unlawfully and unjustly, and without the leave or license, and against the will, of the plaintiff, *made and sold* divers, to wit, twenty, lift-pumps in imitation of the said invention of the plaintiff in the said specification and memorandum of alteration described, and not so disclaimed as aforesaid, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns as aforesaid: that, the said letters patent having been so made as aforesaid, and the said specification so enrolled as aforesaid, and the said disclaimer and memorandum of alteration having been so entered, filed, and enrolled as aforesaid, and the said invention having been so made, used, exercised, and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving and intending as aforesaid, after the making of the said letters patent, and after the entering and filing and enrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the said term of fourteen [153] years in the said letters patent mentioned, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of the suit, in England aforesaid, unlawfully and unjustly, and without the leave or license, and against the will, of the plaintiff, *did make* divers, to wit, twenty, lift-pumps in imitation of the said invention of the plaintiff in the said specification and memorandum of alteration described, and not so disclaimed as aforesaid; and *did sell* divers, to wit, twenty, *other* lift-pumps in imitation of the said invention of the plaintiff, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns as aforesaid: that the said letters patent having been so made as aforesaid, and the said specification so enrolled as aforesaid, and the said invention having been so made, used, and exercised and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving, &c., after the making of the said letters patent, and after the entering, filing, and enrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the said term of fourteen years, to wit, on the day and year last aforesaid, and on divers other days, &c., in England aforesaid, unlawfully and unjustly, and without the leave or license, and against the will of the plaintiff, *did use, exercise, and put in practice* the said invention of the plaintiff in the said specification and memorandum of alteration described, and not so disclaimed as aforesaid, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns as aforesaid: that, the said letters patent having been so made as aforesaid, and the said specification so enrolled as aforesaid, and the said disclaimer and memorandum of alteration having beer so entered, filed, and enrolled aforesaid, and the said *invention having been [154]

so made, used, exercised, and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving, &c., after the making of the said letters patent, and after the entering, filing, and enrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the said term of fourteen years, to wit, on the day and year last aforesaid, and on divers other days, &c., in England aforesaid, unjustly and unlawfully, and without the leave or license of the plaintiff, and against the will of the plaintiff, did *counterfeit, imitate, and resemble* the said invention of the plaintiff, to the use and enjoyment whereof the plaintiff was at the days and times last aforesaid entitled under the said letters patent, and did use and put in practice the same, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns: and that, the said letters patent having been so made as aforesaid, and the said specification so enrolled as aforesaid, and the said memorandum of alteration having been so entered, filed, and enrolled as aforesaid, and the said invention having been so made, used, exercised, and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving, &c., after the making of the said letters patent, and after the entering, filing, and enrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the said term of fourteen years, to wit, on the day and year last aforesaid, and on divers other days, &c., in England as aforesaid, unlawfully and unjustly, and without the leave or license of the plaintiff, and against the will of the plaintiff, *did make and sell* divers, to wit, twenty, *lift-pumps in imitation of the said invention of the plaintiff, with certain additions thereto, and subtractions from the same, whereby to pretend themselves the*
 *155] *inventors and devisers thereof*, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns; whereby, &c.

To this declaration the defendants, amongst other pleas, pleaded—that, after the making of the said letters patent, and before the making and entering and enrolling of the said disclaimer and memorandum of alteration, to wit, on the 5th day of August, 1840, our lady the now Queen, by her letters patent, duly sealed in that behalf with the Great Seal of the said United Kingdom, bearing date at Westminster the day and year last aforesaid, did give and grant unto William Beetson, his executors, administrators, and assigns, her said majesty's especial license, full power, sole privilege, and authority that the said William Beetson, his executors, &c., and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents—or such others as the said William Beetson, his executors, &c., should at any time agree with, and no other, from time to time and at all times thereafter during the term of years therein expressed,—should, and lawfully might, make, use, exercise, and vend a certain invention of “Improvements in water-closets and stuffing-boxes applicable to pumps and cocks;” that the last-mentioned

letters patent, so granted to the said William Beetson, had been from the day and year last aforesaid, and still were, in full force and effect, and had not been repealed or otherwise rendered void; that, after the making and granting of the said letters patent to the said William Beetson as aforesaid, and before the making and enrolling of the said disclaimer and memorandum of alteration as in the declaration mentioned, they, the defendants, agreed with the said William Beetson for license, power, and authority to make, use, exercise, and vend his said invention, so far as the same was and might be applicable to stuffing-boxes applicable to pumps; that they had enjoyed the said license, power, and authority so granted to the said William Beetson as aforesaid under and by [156 virtue of the said agreement with the said William Beetson for the making of the same thenceforth hitherto, and under and by virtue of the said agreement, and the license, power, and authority thereby granted, had made and sold divers large quantities of pumps to their great advantage and profit; and that the alleged grievances in the declaration mentioned were the making, using, exercising, and vending as aforesaid the said improvements in pumps for which the said letters patent were so granted to the said William Beetson as aforesaid, and the said license, power, and authority were so granted to the defendants as aforesaid—verification.

To this plea the plaintiff demurred specially, assigning for causes—that it was no answer to an infringement of the plaintiff's patent that the defendants worked under a license from another and subsequent patentee; that the plea contained no certain averment that the invention for which the letters patent were granted to Beetson was the same as the invention contained in the plaintiff's patent, and described in his specification; that, if the plea meant that Beetson's invention was the same as the plaintiff's, the plea was bad for argumentativeness, because it was by inference only that such a meaning could be collected from it; that if, on the contrary, the plea did not mean that the inventions were the same, it was equally bad, as amounting to an argumentative plea of not guilty; and that the plea was uncertain, equivocal, and ambiguous, and that no certain or direct issue could be taken upon it. Joinder.

Sir *T. Wilde*, Serjt., in support of the demurrer.^(a) The plea seems intended to raise this point—supposing a patent granted to A., [157 and another patent granted to B. in respect of the same subject-matter, and A. afterwards enters a disclaimer as to part of his specification, whether A.'s patent, being bad until corrected by the disclaimer, is avoided by that of B. Now, in order to raise this point, it is essential that it should be averred in the plea that the two patents are for the

(a) The points marked for argument, on the part of the plaintiff, were—that a license from Beetson, a subsequent patentee, could not justify an infringement by the defendants of the plaintiff's patent—that the plea was bad for uncertainty, and also for argumentativeness—that it amounted to the general issue—and that it was not alleged in the plea that the defendants had a license from Beetson by deed, and that a license not under seal would be inoperative.

same thing. "Improvements in pumps" would cover and apply to "improvements in lift-pumps." When taking out a patent for improvements in engines, it is not necessary to describe, in the title, to what particular description of engines the improvements are applicable: the *specification* will show that. The plea gives no account of Beetson's patent except what appears from its title—"Improvements in water-closets and stuffing-boxes applicable to pumps and cocks." There is no averment that the two patents are identical: their identity cannot be predicated from their titles; and there are no averments in the plea to aid us in coming to the conclusion that they are the same. [EARLE, J. The way in which the defendants seek to make out the identity is this: the plaintiff says, the articles made and sold by the defendants were his invention; the defendants say they were Beetson's: if both these statements are true, then the two patents are identical.] That would render the plea obnoxious to the charge of argumentativeness. Again, it is not alleged in the plea that Beetson's patent was granted for the articles made by the defendants; but that, before the making and enrolling of the plaintiff's disclaimer, a patent was granted to Beetson, that Beetson *158] "licensed the defendants to use his invention, and that they, under and by virtue of that license, made and sold divers large quantities of pumps—not saying that the pumps made and sold by them were made under the protection of Beetson's patent. The main question, however, is, what is the effect of the disclaimer? Whether it operates retrospectively to make the patent valid from the date of its grant except as to actions pending at the time of the disclaimer, or to make it a good and valid patent only from the time of the disclaimer; or, in other words, what is the effect of the disclaimer upon a patent granted to another after the grant of the original patent and before the date of the disclaimer? [TINDAL, C. J. How does it appear that Beetson's patent was granted after the date of the plaintiff's patent and before the making and enrolment of the disclaimer? The dates are all under a videlicet, which is very inconvenient and very unnecessary; for, if wrong, the dates may be amended.] It does appear by the plea, and not under a videlicet, that Beetson's patent bore date the 5th of August, 1840: and the other dates are sufficiently ascertained. The infringement is alleged to have taken place after the making and enrolment of the disclaimer; leaving the only question, what is the effect of the intermediate patent? It is not to be *assumed* that the plaintiff's patent is bad because the patentee has, from abundant and perhaps unnecessary caution, entered a disclaimer as to part: and there is no allegation here that the plaintiff's patent is bad, except the argumentative one that Beetson's is valid. This question would present much more difficulty but for the statute 5 & 6 W. 4, c. 83, s. 1, which expressly provides that the disclaimer shall not be evidence in any action already pending. That section enacts "that any person who, as grantee, assignee, or otherwise,

hath obtained, or who shall hereafter obtain, letters patent for the sole
 *making, exercising, vending, or using of any invention, may, if
 he think fit, enter with the clerk of the patents of England, Scot- [*159
 land, or Ireland, respectively, as the case may be,—having first obtained
 the leave of H. M.'s attorney-general or solicitor-general in case of an
 English patent, or of the lord advocate or solicitor-general of Scotland
 in the case of a Scotch patent, or of H. M.'s attorney-general or solicitor-
 general for Ireland in the case of an Irish patent, certified by his fiat and
 signature—a disclaimer of any part of either the title of the invention or
 of the specification, stating the reason for such disclaimer; or may, with
 such leave as aforesaid, enter a memorandum of any alteration in the
 said title or specification, not being such disclaimer or such alte-
 ration as shall extend the exclusive right granted by the said letters
 patent; and such disclaimer, or memorandum of alteration, being filed
 by the said clerk of the patents, and enrolled with the specification, shall
 be deemed and taken to be part of such letters patent or such specifica-
 tion in all courts whatever: provided always, that any person may enter
 a caveat, in like manner as caveats are now used to be entered, against
 such disclaimer or alteration; which caveat being so entered shall give
 the party entering the same a right to have notice of the application be-
 ing heard by the attorney-general, or solicitor-general, or lord advocate,
 respectively: provided also that no such disclaimer or alteration shall be
 receivable in evidence in any action or suit (save and except in any pro-
 ceeding by *scire facias* (a),) pending at the time when such disclaimer
 or alteration was enrolled; but in every such action or suit the original
 title and specification alone shall be given in evidence, and deemed and
 taken to be *the title and specification of the invention for which [*160
 the letters patent have been or shall have been granted: provided
 also, that it shall be lawful for the attorney-general, solicitor-general, or
 lord-advocate, before granting such fiat, to require the party applying for
 the same to advertise his disclaimer or alteration, in such manner as to
 such attorney-general, or solicitor-general, or lord-advocate, shall seem
 right, and shall, if he so require such advertisement, certify in his fiat
 that the same has been duly made." [CRENSWELL, J. It is impossible
 that the patent can, for *all* purposes, date from the time of the disclaimer;
 for, in that case, it would be made to date from a time after the public
 had become acquainted with the whole matter.] That affords a per-
 fectly unanswerable argument. What is the effect of the provision in the
 act that the disclaimer shall be deemed and taken to be part of the letters
 patent or specification? That the alteration is supposed to be written
 into, and is to be looked at as part of the original specification, like any
 other amendment made with competent authority. An amendment being
 made, no inquiry is ever instituted as to the time when it was made.

(a) As to the proceeding by *sci. fa.* to repeal letters patent, see *Smith v. Upton*, 6 Mann. &
 Gr. 251, and notes to that case.

And, where the statute says that the disclaimer or alteration shall not be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*,) pending at the time when such disclaimer or alteration was enrolled, does not that carry with it the conclusion that, in all cases, save where an action is pending, the specification with the disclaimer *shall* be evidence? [TINDAL, C. J. Probably not in all cases and for all purposes. In *Perry v. Skinner*, 2 M. & W. 471, it was held by the court of Exchequer, that, where a patent is originally void, but is amended under the 5 & 6 W. 4, c. 83, by filing a disclaimer of part of *161] the invention, *that act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer.] If Beetson's patent be for the same invention as the plaintiff's originally was, and the plaintiff's patent be bad, Beetson's cannot be good. [CRESSWELL, J. Your argument will apply much more cogently if the fact be that Beetson's patent was taken out after the enrolment of the specification of the plaintiff's patent: but the date of the enrolment is laid under a *videlicet*. Suppose, by reason of the non-enrolment of a specification, the first patent becomes void, would that be such a publication as would avoid a patent subsequently taken out for the same purpose?] Certainly not: the first patent would have died a natural death from non-performance of the condition subsequent. It is clear that this patent and the disclaimer must take effect from the original grant. The plea is altogether uncertain. If the plaintiff's patent is to date from the disclaimer, the infringement was subsequent: if it be said that the plaintiff's patent is void by reason of the grant to Beetson, the plea is bad for not showing that the two patents are identical, or that that which the defendants have done they have done under the protection of Beetson's patent. [ERLE, J. The plea in effect is, that the plaintiff's patent is void *quoad* Beetson.] It is impossible to say that a patent is void as against a subsequent patentee, and good as to the rest of the world.

Byles, Serjt., (with whom was *Webster*,) contra. (a) The plea is good *162] in substance and in form. The case *falls within the very terms of the decision in *Perry v. Skinner*. It was contended there, as it has been here, that the disclaimer under the statute of 5 & 6 W. 4, c. 83, s. 1, had a retrospective operation. But Lord ABINGER, C. B., said: "It cannot be doubted that the act of parliament is obscurely worded; and we are now called upon to put an interpretation upon it. The act

(a) The points marked for argument on the part of the defendants, were—that the rights of the plaintiff (if any) dated from the entry of the disclaimer and memorandum of alteration, and not from the granting of the original letters patent—that no letters patent were ever granted for the invention of which an infringement was alleged in the declaration—that the declaration was insufficient, and did not show any cause of action or any infraction of the privilege granted to the plaintiff by the letters patent therein mentioned—and that the plaintiff's patent was altogether void until the entry of the disclaimer.

would be unjust if it made a man who was acting consistently with the law at a certain time, subsequently a wrong-doer by relation. We never can presume that such was the intention of the legislature; and we are not at liberty to construe a doubtful act by any such presumption. The only argument that can be offered is upon the proviso, which says 'that no disclaimer shall be receivable in any action or suit pending at the time when such disclaimer was enrolled.' We consider the sound way of interpreting that, is, that it shows the legislature did not intend to make a person a wrong-doer by relation; because it did not presume that any man would have the courage to bring an action, after he had actually disclaimed, for an infringement of a patent long before such disclaimer was thought of. The intention of the legislature doubtless was, that he should not have the benefit of the disclaimer as to infringements gone by long before such disclaimer was made." And PARKE, B., added: "The rule by which we are to be guided in construing acts of parliament is, to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and, if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done. Now, if the construction contended for by Mr Rotch was to be considered as the right construction, it would lead to the manifest injustice of a party who might have put himself to great expense in the making of machines or engines, the subject of the grant of a patent, on the faith of that patent being void, being made a wrong-doer by relation. That is an effect the law will not give to any act of parliament, unless the words are manifest and plain. We must engraft, therefore, a modification upon the words of the act in this case for the purposes of its construction, and read it as though it had been 'shall be deemed and taken as part of the said letters patent, &c., from thenceforth,' so as not to make the defendant a wrong-doer. The only doubt arising in this case, is, from the words of the proviso; but we cannot think the legislature meant to do so unjust a thing as to restrict a party from doing that which he has a lawful right to do; and therefore, though there is some obscurity in the words of the act, we are bound to put a reasonable construction upon them; and, undoubtedly, the effect of it is to make the patent good for the future." Where the patent, as originally specified, is bad, no action can be maintained for an infringement between the grant of the original patent and its reformation by the disclaimer. It is alleged in the plea, and admitted by the demurrer, that a third party has taken out a valid patent for the same invention. On whom lies the burden of proving the validity or the invalidity of the original patent? Clearly not on the defendant in the first instance. The plaintiff commences his declaration in the usual form, by stating himself to be the true and first inventor of the invention as originally specified: he states that he is the true and first inventor "of so much of certain improve-

ments in pumps mentioned in the letters patent thereafter stated, as
 *164] was not *thereinafter mentioned to have been disclaimed by him."

If the plaintiff had been declaring on the original patent, the absence of an averment that he was the true and first inventor would have been fatal on general demurrer; for, all patents being, by the statute of James, *prima facie* void, the plaintiff must bring himself within the exception. Assuming, then, that the plaintiff's patent was bad originally for claiming too much, Beetson has taken out another patent for an invention which includes within it so much of the plaintiff's patent as the breach consists of. How does it appear here that the alleged infringement was subsequent in point of date to the disclaimer, the dates being under a *videlicet*? The effect of the *videlicet* is much discussed in the notes to Dakin's case, 2 Wms. Saund. 290 a. [TINDAL, C. J. The insertion of a *videlicet* does not make that which was a material averment immaterial. Of all things, the date of a record is most material.] Then, is the plea bad for any of the causes of demurrer specially assigned? The first cause assigned is, that the plea contains no certain averment that the invention, for which the letters patent were granted to Beetson, was the same as the invention contained in the plaintiff's patent, and described in his specification. The defendants do not say it is the same: they merely say that the one is included in the other—that the alleged infringement was a thing they had a right to do under the license granted to them by Beetson. Another ground of demurrer is, that, if the plea means that Beetson's invention is the same as the plaintiff's, it is bad for argumentativeness. This, however, is not sufficiently precise and specific. By a rule of court made in 1654,(a) it is provided, "that, according to the statute of 27 of Eliz. (c. 5,) upon demurrers, the causes
 *165] be specially assigned, and not involved with general *unapplied expressions of double, negative pregnant, uncertain, wanting form, and the like, but to show specially wherein, that the other party may (as the case shall require) either join in demurrer, or amend, paying costs, or discontinue his action." And this rule was recently acted upon by the court of Queen's Bench in *Smith v. Clench*, 2 Q. B. 835.

Sir T. Wilde, Serjt., in reply. The judgment of the court of Exchequer in *Perry v. Skinner*, which seems to be rather making, than construing the law, does not affect the present question.

TINDAL, C. J. The question in this case arises upon a special demurrer to the last plea pleaded by the defendants to a declaration which alleges a patent granted to the plaintiff for certain improvements in pumps, and a subsequent disclaimer by him, under the statute, of part of his specification: and the question is, whether the plea is a good or a bad one. The judgment I have formed of the plea is, that it is bad. To make it a good plea, it must both confess and avoid the matters charged in the declaration. Now, the confession, to be a good one,

(a) Mich. 1654, § 20, Peacock's Rules, (C. P.) p. 23.

must be a confession that the defendants have infringed that part of the plaintiff's patent which remains valid. Admitting, for argument's sake, that there is a sufficient confession, it appears to me that nothing is alleged in the plea that amounts to an avoidance of the plaintiff's patent. It is said that the plaintiff's patent, as it originally stood, was void in law: but there is no allegation in the plea that the patent was void, unless the statement of the disclaimer and of the grant of another patent to Beetson amounts to such an allegation. Now, I never can consider that the entering *of a disclaimer as to part of a specification, *necessarily* imports that the patent is bad. The object [*166 of that proceeding is, not merely to set right the description of the alleged invention where it is known to be wrong, but to obviate any doubt that may arise on the specification as enrolled. Then, is the patent void by reason of the subsequent grant to Beetson? The plaintiff's patent appears to have been granted on the 4th of March, 1837, Beetson's patent on the 5th of August, 1840, and the disclaimer was entered on the 1st of March, 1844. Does it necessarily appear that the grant of the patent to Beetson in 1840 makes the precedent patent granted to the plaintiff void in law? It appears to me that no such inference can arise upon this record. Taking the plaintiff's original patent and specification with the qualification engrafted upon it by the subsequent disclaimer, we must, upon this record, assume that Beetson's patent was taken out for the same invention as the plaintiff's; and therefore that Beetson's patent is void in law, not perhaps for all purposes, but that upon this record Beetson's patent cannot be held to be a good one; and, if so, there is nothing in the plea that necessarily avoids the patent granted to the plaintiff. I am, therefore, of opinion that the plaintiff is entitled to judgment.

CRESSWELL, J.(a) I also think the plaintiff must have judgment on this plea. It is not contended that the plaintiff has not shown a good cause of action, so far as the declaration is concerned. It must be taken that the plea has confessed the matters charged in the declaration; otherwise it would amount to not guilty only, and would be bad on that ground. Taking it, then, to be a plea in confession, it seeks to avoid the effect of *that confession by showing a patent granted to a [*167 third person for something that involves the plaintiff's alleged invention. In the first place, does the plea show a valid patent granted to Beetson? I think it does not. It appears that Beetson's patent was taken out some years after the plaintiff's patent. The plaintiff's patent is stated to have been taken out on the 4th of March, 1837, and his specification is stated to have been enrolled within six calendar months; and that is not denied. No addition is made to that specification. The subject-matter of the plaintiff's invention is therefore made known to the public in 1837. Beetson subsequently, viz. in 1840, takes out a

(a) Maule, J., was absent.

patent in respect of an invention that had been previously disclosed to the public by the enrolment of the plaintiff's specification. Therefore Beetson's patent is bad. But, assuming Beetson's patent to be valid, then come the objections in point of form. My brother *Byles* contends that the plea is, in substance, a denial of novelty in the plaintiff's invention. If so, it is a very round-about one: it is an argumentative assertion of the identity of the two patents, whence a conclusion is argumentatively drawn that the plaintiff's invention is not new. It is hardly necessary to say any thing as to the operation of the disclaimer. But I incline to think that the words "from thenceforth" may very well be introduced into the clause in the manner suggested in the judgment of PARKE, B., in *Perry v. Skinner*, so as to avoid a construction that would make a party a wrong-doer by relation.

ERLE, J. I concur with my lord and my brother CRESSWELL in thinking that there should be judgment for the plaintiff on this plea. Taking it in the most favourable view for the defendants, still I think there is abundant ground for holding the plea bad. It appears to me, that, *168] where a disclaimer is entered as to part of "a patent, the amended patent has all the incidents of a valid patent from the date of the original grant. It is amended, for all purposes subsequent to the disclaimer. The grievances charged in the declaration were things done in breach of the plaintiff's patent.

Judgment for the plaintiff.(a)

(a) Vide, *Stead v. Cary*, post.

MANNING and Another v. IRVING. Jan. 22.

A policy was effected in June, 1843, upon a ship (originally built for the East India Company's service) valued at 17,500*l.*, at and from China to Madras, and back to China. The vessel was purchased by the plaintiffs in 1839 for 11,000*l.* During the voyage, the vessel was, by a peril insured against, dismasted; and by the wreck of the masts and rigging falling over the ship's sides and striking under her hull, her copper and sheathing were much injured. The necessary expenditure to repair the damages so sustained by the ship, and to refit her masts, sails and spars, rigging, and sheathing, &c., so as to render her seaworthy for the voyage insured, would have amounted to not less than 10,500*l.*; and, if such expenditure had been incurred, the ship would have been worth a sum not exceeding 9000*l.* During the hurricane the vessel made no more water than usual; and upon examination of the ship at Calcutta, the hull did not appear to be injured, and the ship appeared to be sound in all other respects than those above mentioned:—Held, upon a special case reserved, that the underwriters were liable as for a total loss.

THIS was an action of assumpsit brought by the plaintiffs, managing owners of a vessel called the *General Kyd*, against the defendant, one of the directors and chairman of the Alliance Marine Insurance Company, under the provisions of an act of parliament, making the company liable to be sued in the name of their chairman. The first count was upon a policy of insurance for 3000*l.*, duly subscribed on behalf of the company upon ship valued at 17,500*l.*, at and from China to Madras, while there,

and back to China, not east of Hong Kong, with leave to call at the Straits; and *averred a loss by perils of the sea. The second [*169 count was for money paid, the third for money had and received, the fourth for interest, the fifth on an account stated. The defendant pleaded to the first count, that the vessel was not wholly lost, in manner and form, &c., and to the last four non assumpsit; upon both of which pleas issue was joined.

At the trial, before CRESSWELL, J., at Guildhall, at the sittings after Trinity term, 1844, a verdict was found for the plaintiffs, damages 3000*l.*, subject to the following case:—

The plaintiff's vessel, the General Kyd, of 1318 tons, had been originally built for, and employed in, the trade of 'he East India Company, whilst the company retained its trading privileges, and had been built at a very great expense; and in consequence of the company ceasing to trade, upon the alteration of their charter, the General Kyd, and all other ships of the same class, ceased to be in demand.

The plaintiffs purchased the vessel in 1839, for 11,000*l.*

The policy in question was effected by the plaintiffs in June, 1843; and at that time, according to advices from the purser of the ship, then in China, the cost of the vessel to them, including, however, wages and other matters not constituting part of the permanent value of the ship, amounted to 17,500*l.*, the value in the policy.

No insurance was effected by the plaintiffs on the freight of the said ship on the voyage insured.

The vessel, upon former voyages, had been frequently insured at the same or a higher valuation, and was known to the defendants to have been in the service of the East India Company.

The ship sailed on the voyage insured, from Singapore, on the 25th of April, 1843, and in the course of such voyage arrived in the Madras Roads upon the 18th of *May following, for the purpose of taking [*170 in a cargo of cotton, which was purchased and provided for shipment on behalf of her owners.

On the 21st of May, 1843, whilst so lying in the Madras Roads, the vessel was carried out to sea in ballast by a violent hurricane; and on the following day, during the gale, and whilst still at sea, she was dismasted, and by the wreck of the masts, sails, and rigging falling over the ship's sides, and getting and striking under the hull, the copper and wood sheathing on the bottom of the vessel was much injured.

In order to save the vessel, and for the preservation of the crew, she was necessarily carried into Calcutta.

The necessary expenditure to repair the damages sustained by the ship, and to refit her masts, sails and spars, rigging, copper and wood sheathing, and other things, so as to render her seaworthy for the voyage in question, would have amounted to a sum of not less than 10,500*l.*

If such expenditure had been incurred, the ship would have been

worth (either in England or Calcutta) a sum not exceeding 9000*l.*; and such would have been her marketable value if put up for sale in that state of repair, either at the period of effecting the policy, or just before the damage, or at the time at which the repairs would have been completed.

During the hurricane the vessel made no more water than usual; and, upon examination of the ship at Calcutta, the hull did not appear to be injured, and the ship appeared to be sound in all other respects than those above mentioned.

The vessel, upon her arrival in Calcutta, was put into dock for survey and examination. She was surveyed four times, on the several dates following—2d of June, 9th of June, 3d of July, and 7th of July, 1843.

*171] Upon the survey held on the 2d of June, the *surveyors recommended that the vessel should be docked for further examination, and in the mean time spars should be procured for masts, yards, &c., on the most reasonable terms; also that estimates should be obtained from the various ship-chandlers and others for the supply of the stores required to replace the General Kyd in the same position as before the hurricane.

Upon the survey held on the 3d of July, 1843, the surveyors recommended the copper and sheathing to be stripped off the bottom, and that it should be dubbed down bright from the gunwale to the keel, to ascertain whether or not the ship had received any further injury in her bottom from the wreck of the masts.

Upon the survey held on the 7th of July, 1843, the surveyor reported that the ship had experienced very severe weather, having been blown out of the Madras Roads, after which she encountered one of those violent gales of wind, or hurricanes, which prevail in the Bay of Bengal during the month of May, *which reduced the hull to a complete wreck*, the main-mast and mizen-mast breaking off below the hounds, the fore-mast and bowsprit badly sprung; in fact so crippled was the ship in masts and yards as to require nearly the whole of them to be renewed; that the examination of the hull which he had been enabled to make on the upper deck, gun or middle deck, orlop, and hold, showed that the said ship had not worked on her fastenings; that the closeness of all the butts, scarps, and edges of the planks, showed not the slightest movement; and that the beam-ends, knees, and bolts seemed to be nearly in the same state as when first forged and fastened; that equally so was the hull on the outside, as regarded the topsides and wales; and that, judging from the bottom plank, where the copper and sheathing had been torn off by the wreck of the masts, the seams were in a most perfect
*172] state; that the keel of the said ship was remarkably *straight for a vessel of her age, having only four inches camber in thirty feet from the fore-post; that, aft from that length to the stern-post, it formed nearly a horizontal: a similar sized ship built in Europe of oak

and fir, tree-nailed fastened, would in all probability, when from twelve to fifteen years old, have cambered fifteen to eighteen inches. The blocks were not cut into, which showed that the keel had not moved since the said ship was docked.

The said last-mentioned surveyor recommended that the bottom of the said ship should be stripped, the copper and sheathing being much injured by the masts, thoroughly overhauled, dubbed bright, and, if it proved, as he expected, free from decay, it should be well caulked, felted, sheathed, and coppered; that the channels and chain-plates should be partly renewed and repaired; that the masts and yards should be completed, and the wales, topsides, and decks caulked, with sundry trifling jobs to be done about the hull; after which the said last-mentioned surveyor reported that the said ship, as regarded hull, masts, and yards, would be fit for sea, and a good sea risk to any part of the world.

The said ship was built at Calcutta about thirty years before that time, of the best materials, and was most expensively fastened with copper from the keel to the wales, and in the upper works with iron.

Estimates were procured after the surveys, of the costs of the necessary repairs and refittings, to render the ship seaworthy as before mentioned; and such cost would have amounted to the sum before mentioned.

After such repairs the vessel would not have been a worse ship than before, unless it had been discovered in the course of such repairs that the vessel had received any further injury in her bottom from the wreck of the masts. Some materials for repairing the vessel were *pro- [173 cured by the master, and some repairs were commenced, but were afterwards discontinued. Those repairs were principally for the purpose of protecting the vessel from sustaining additional damage; and masts, spars, sails, and other articles were also purchased for the purpose of proceeding to effective repairs.

On the 10th of October, 1843, on receipt of information of the extent of damage and repairs required (as stated in the surveys and estimates,) an abandonment of the vessel was duly made to the underwriters, which the underwriters refused to accept.

The vessel has not since been repaired.

The question for the opinion of the court is, whether, under the circumstances, the defendants were liable as for a total loss. If the court shall be of that opinion, interest is to be added to the amount, if the court shall be pleased to put itself in the situation of a jury, and shall think it fit that interest should be allowed. If the court shall be of opinion that the loss was an average loss, and not a total loss, the verdict is to be entered for an amount of damages to be estimated out of court, in a mode agreed upon between the parties. Either party is to be at liberty, upon the argument, to refer to the pleadings, and, with the permission of the court, to turn the case into a special verdict.

Sir *T. Wilde*, Serjt., (with whom was *Greenwood*,) for the plaintiffs. (a) Upon the facts stated in the special case, the defendants are liable as for a total loss. It appears that, in the course of the voyage, the vessel, by *174] a peril insured against, sustained damage to such an extent, *that she was no longer capable of being used as a ship without an outlay of 10,500*l.*, which would exceed by 1500*l.* her value when repaired. It has been so repeatedly decided that the underwriters are liable as for a total loss, where the vessel is by perils of the sea reduced to such a state as to be no longer available as a ship but at an expense which no prudent owner, if uninsured, would incur, that it would be idle to argue the point in a court of co-ordinate jurisdiction. The principal case upon the subject is that of *Allen v. Sugrue*, 8 B. & C. 561, 3 Mann. & R. 9, to which may be added *Young v. Turing*, 2 Mann. & Gr. 593, 2 Scott, N. R. 752. Nor does the circumstance of the value being stated in the policy make any difference: the cases of *Allen v. Sugrue* and *Young v. Turing* both arose upon valued policies. [MAULE, J. The value stated in the policy can have no bearing on the question.] The court called upon

Channell, Serjt., (with whom was *L. J. Brown*,) for the defendant. Admitting the force of the decisions adverted to, the defendant is desirous of reviewing them before a court of error. [CRESSWELL, J., referred to *Cambridge v. Anderton*, 2 B. & C. 691, 4 D. & R. 203, R. & M. 60, 1 C. & P. 213, and Sir *T. Wilde*, to *Read v. Bonham*, 3 Brod. & Bingh 147, 6 J. B. Moore, 397, as authorities for the same position.] In *Allen v. Sugrue*, the vessel, which was valued in the policy at 2000*l.*, received damage by perils of the sea, which could have been repaired for 1450*l.*; but the jury found that she was not worth repairing: and it was held that this was a total loss, and that the assured were entitled to recover the sum at which the vessel was valued in the policy. And in *Young v. Turing*, the ship *Eliza*, (Dutch built,) valued at 8000*l.*, was *175] insured at *and from Rotterdam to Java and Sumatra, and back again to a port in Holland: in the course of her voyage she was stranded on the Goodwin Sands, and plundered: she was afterwards removed, and ultimately brought to London, and notice of abandonment given to the underwriters: it appeared, that, just before the *Eliza* was cast away, she was worth 5833*l.*; that her value as she lay was 700*l.*; and that the salvage was 420*l.*: it was proved by English witnesses that the expenses of repairing the ship in England would be 4615*l.*; that, if she had been entitled to a British register, she would have been worth, when repaired, from 4500*l.* to 4700*l.*; and that if she had been a British ship, it would have been prudent for a British owner to repair her: it

(a) The plaintiffs' point (more general than the statement of the question at the conclusion of the case) marked for argument was, "that, under the circumstances set forth in the case, there was a total loss, and that the defendant was liable upon the policy effected with the company as for a total loss."

was proved by Dutch witnesses, that the expense of repairing her in Holland would have been far greater, and that her value when repaired in Holland would not have exceeded 2915*l*.: it was also proved that the trading companies in Holland will not employ a vessel that has been stranded in the manner in which the *Eliza* was stranded, however perfectly she may have been repaired, and that this circumstance would affect her value in Holland: the judge, in his summing up, told the jury that, in considering whether this was the case of a partial or a total loss, they ought not to take into account the value in the policy; and that, in considering the same question, they ought to look at all the circumstances *attending the ship*, and to judge whether, under all those circumstances, a prudent owner, if uninsured, would have declined to repair the ship; and, if so, they might find it a case of total loss. Upon a bill of exceptions tendered, this direction was held to be correct. In the present case, the court is asked to decline to infer from the facts stated, that a prudent owner, if uninsured, would not have repaired the vessel. 'It appears that the ship was dismasted in a hurricane, and that, though somewhat damaged in her sheathing, her hull was altogether uninjured; and that the expense of repairing her would exceed, by 1500*l*., her *marketable* value when repaired. But it also appears that the plaintiffs had bought her for 11,000*l*. And it may be that a vessel is worth more to her owners than her mere market value. It is also to be observed, that the plaintiffs themselves have invariably treated her as worth more than 10,500*l*.: and she was valued in the policy at 17,500*l*., at which, or a higher, value she had frequently before been insured. There is no suggestion by any surveyor that it would not have been prudent to repair her. [CRESSWELL, J. The question is, not whether or not the plaintiffs would, if uninsured, have repaired her, but whether a prudent owner would have done so, abstractedly from any particular fancy. Now, a prudent owner could hardly be expected to lay out 10,500*l*. to get a ship worth only 9000*l*.] In *Young v. Turing* the peculiar position of the assured was taken into account. So, here, taking the peculiar character of this ship into consideration, the court will draw such inference as they may think reasonable. [MAULE, J. It is a common course in special cases to provide that the court shall be at liberty to draw such inferences from the facts stated as a jury might have drawn; and that perhaps somewhat enlarges their power. But I apprehend that the court may in *all* cases draw such inferences as are reasonable, and obviously arise out of the facts that are stated. No person at all acquainted with the doctrine of *Allen v. Sugrue* could hesitate to pronounce this a case of total loss.]

Per curiam. There can be no doubt that this case falls within the principle of those that have been *adverted* to; and, consequently, the plaintiffs must have judgment. [*177]

Judgment for the plaintiffs.

Channell, Serjt., then applied for leave to turn the special case into a special verdict.

TINDAL, C. J. When stated in the form of a special verdict, it seems to me that the case will be incapable of argument in a court of error.

MAULE, J. If you can establish that the value stated in the policy is conclusive, that may furnish a very good argument. All the details of the damage to the ship should be struck out, and the special verdict must be so framed as that a writ of error upon it may be, in effect, a writ of error upon the judgment in *Allen v. Sugrue*.

CRESSWELL, J. It must be taken that this court draws the inference, that a prudent owner, uninsured, would not, under the circumstances, have repaired the vessel.
Rule accordingly.

Sir T. Wilde, Serjt., having on a subsequent day asked for interest,

TINDAL, C. J., now said that the court had considered the matter, and thought the case was not one in which interest ought to be allowed.

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*JACOBS v. FISHER. Jan. 22.

To a count in debt upon an account stated, the defendant pleaded, as to 18*l.*, parcel of the money in that count mentioned, an agreement between him and one E. E., that he should purchase of E. E. the good-will, stock, and fixtures of a public-house, 20*l.* to be paid as a deposit, to be returned in case E. E. should not fulfil the agreement on her part; that the defendant paid to the plaintiff 2*l.* in part payment of the deposit, and gave him an I. O. U. for 18*l.*, "which said I. O. U. was the account stated in the last count mentioned as to the said sum of 18*l.*, parcel, &c.;" and that E. E. failed to perform the agreement on her part, and consequently became bound to return the deposit, of which plaintiff had notice—*Held*, bad on special demurrer, as amounting to never indebted.

DEBT for money paid and for money found due upon an account stated.

Plea, as to the sum of 18*l.*, parcel of the moneys in the last count mentioned, and the damages and causes of action in respect thereof, that, just before the stating the accounts in the last count mentioned as to the said sum of 18*l.*, parcel, &c., to wit, on the 29th of June, 1833, an agreement was made and entered into between the defendant and the plaintiff as the agent to Elizabeth English, by which, amongst other things, it was agreed that the said Elizabeth English should let all her right, title, and interest of and in a certain house and premises then in her possession, known by the sign of the Bell, situate and being at Isleworth, in the county of Middlesex, for the sum of 30*l.* for good-will, and assign over good and sufficient beer and other licenses on being paid for the term unexpired therein; also should sell such part of the household furniture, fixtures, and effects then in her dwelling-house and premises, which she might have a right to sell, at fair appraisement to be made by two appraisers on or prior to the day of possession, but, in default of their agreeing, then by their umpire; likewise the sound and saleable stock in

trade, consisting of wine, spirits, and compounds, not exceeding the value of 30*l.*, by gauge and valuation of two licensed gaugers, or their umpire; that such appraisement, gauge, and time of delivering up possession of the premises, *should be on or before the 10th of July, at which time all rent, taxes, and gas-light rent should be cleared up, and external damaged glass windows should be made good, or an allowance for the same: and the defendant thereby agreed to accept the said house and premises, having a good title to the licenses, and pay unto the said Elizabeth English the said price or sum for the good-will; also to buy the said household furniture and fixtures at appraisement, with the stock in trade as aforesaid, and that such appraisement, gauge, and time of taking possession should be on or before the 10th of July, at which time the purchase money should be duly paid, one moiety of the whole expenses to be paid by each party; and, as earnest of the said agreement, that the defendant should pay into the hands of the plaintiff the sum of 20*l.*, which was to be allowed as part of payment at the completion of the said agreement; but, if the said Elizabeth English should not fulfil the same on her part, she should return the said deposit. Averment, that, at the time of making the said agreement, the defendant paid to the plaintiff the sum of 2*l.*, and then gave and delivered to the plaintiff an instrument in writing called an I. O. U., by which the defendant acknowledged to owe *to the plaintiff* the sum of 18*l.*, instead of the said deposit in the said agreement mentioned; and the plaintiff then, as such agent of the said Elizabeth English, accepted the said sum of 2*l.* and the said I. O. U. as and for the said deposit; *which said I. O. U. is the account stated in the last count mentioned as to the said sum of 18*l.*, parcel, &c.*; that the defendant had at all times from the making the said agreement been ready and willing to perform the same, and had done all things therein contained on his part to be performed, and was on the said 10th of July, 1843, ready and willing to accept and take possession of the said house and premises and licenses, and pay unto the said Elizabeth English the *said price or sum for the good-will, and pay for the term of the unexpired licenses, and to buy and pay for the household furniture and fixtures at appraisement, with stock in trade as aforesaid, and to pay a moiety of the expenses; of all which the said Elizabeth English then had notice; that the said Elizabeth English did not then fulfil the said agreement on her part, and did not nor would then give possession to the defendant of the house and premises, or sell or assign to him the said good-will, licenses, house, furniture, fixtures, or stock in trade, but then wholly neglected and refused so to do, whereby the said Elizabeth English became, according to the said agreement, bound to return to the defendant the said deposit, and the defendant became exonerated and discharged from the payment of the said sum of 18*l.* parcel, &c.; and the plaintiff then had notice of the premises, and had not at any time, either on or before the said 10th of July in the year las'

aforesaid, or at any time before or at the time when he had notice as aforesaid, nor had he since, paid to the said Elizabeth English the said sum of 18*l.*, or any part thereof, and the said 10th of July in the year last aforesaid had elapsed long before the commencement of this suit; that the said Elizabeth English had failed to perform and broken the said agreement long before the commencement of this suit; and that the plaintiff had notice of the premises as aforesaid long before the commencement of this suit—verification.

To this plea the plaintiff demurred specially, assigning for causes (amongst others) that it amounted to the general issue, and was and contained an argumentative and circuitous denial that the defendant ever was indebted to the plaintiff in the said sum of 18*l.*, because it stated a special agreement for paying a sum of 20*l.* to the plaintiff on behalf of another, and alleged that the statement of account as to the said 18*l.*

*181] was an *acknowledgment of owing to the plaintiff the sum of 18*l.*, given to the plaintiff, instead of a portion of the said 20*l.*, and it therefore showed that in point of law there was no statement of account at all between the plaintiff and defendant as to the said 18*l.*, and that no money was found to be due from the defendant to the plaintiff on account stated as to the said 18*l.*; and that it further amounted to the general issue, and was and contained such argumentative denial, because it stated that an I. O. U. therein mentioned was the account stated in the last count mentioned as to the said sum of 18*l.*, whereas an I. O. U. is not a statement of account, but may be evidence of it, and the matters in the plea stated were matters of evidence only, and could not properly be pleaded, and should have been offered in evidence under a plea of never indebted.

Channell, Serjt., in support of the demurrer.(a) The plea does not,
*182] in terms, admit an account stated of *money due from the defendant to the plaintiff. An I. O. U. is not an account stated, but only evidence of an account stated;(b) and might be proved under

(a) The following points for argument were delivered on the part of the plaintiff:—

"That the second plea is bad in substance; that it contains no answer as to the 18*l.* or the causes of action in respect of that sum, because it sets up an agreement by the express terms of which the 18*l.* was to be paid to the plaintiff, and, if Elizabeth English in the plea named should make default, she, and not the plaintiff, was to return the money to the defendant, and it is not shown that the plaintiff committed any default under the agreement with reference to that sum; and that it is not shown that the plaintiff has not entered into some binding agreement with Elizabeth English to pay her the 18*l.*, and the effect of the transaction stated in the plea appears on the whole to be that the defendant became the debtor of the plaintiff for the 18*l.*, for which amount he would presumptively be liable to the said Elizabeth English.

"That the plea is bad, in not showing that Elizabeth English did not before the said 10th of July fulfil or offer to fulfil the agreement on her part; and for not alleging that the defendant was after the making of the agreement, and before the said 10th of July, ready and willing to accept and take the possession, and make the payments mentioned in the agreement.

"That the plea is insufficient, for not showing that Elizabeth English has not returned or paid to the defendant the said deposit.

"And that, if the plea shows any answer to the cause of action to which it is pleaded, it amounts to a set-off, but does not contain the formal parts, or statutory requisites, of a plea of set-off."

(b) *Payne v. Jenkyns*, 4 C. & P. 324; *Curtis v. Rickards*, 1 Mann. & Gr. 46, 1 Scott, N.R. 155.

unquam indebitatus. Besides, the plea leaves it wholly uncertain whether the defendant means to deny the account stated, or admitting the I. O. U., to deny that it is, by reason of subsequent circumstances, a subsisting account. [MAULE, J. The question is, whether or not the defendant *does* admit an account stated: that he *means* to do so is clear.]

Byles, Serjt., *contra*. The question is, whether this plea confesses a good *prima facie* cause of action, and then avoids it. The case is, in principle, not unlike *George v. Claget*, 7 T. R. 359, and *Carr v. Hinchliff*, 4 B. & C. 547. [MAULE, J. I can perceive no admission of an account stated with the plaintiff. TINDAL, C. J. It is pleading evidence only.] The plea admits a debt originally due to the principal, and alleges that the defendant gave to the agent (the plaintiff) 2*l.*, and an I. O. U. for 18*l.*; and then it goes on to show, that, by reason of circumstances which subsequently happened, the principal was precluded from a right to recover. That amounts to an accord and satisfaction of the debt. [MAULE, J. A very round about one; as bad in law as it is void of justice.]

Per curiam. The plea is clearly bad, as amounting only to never indebted.

Judgment for the plaintiff.(a)

(a) *Quere*, whether the facts, if formally pleaded, would not have been matter in confession of an account in fact, and in avoidance of such account, by failure of consideration.

*RANKIN v. DE MEDINA. Jan. 22.

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To a plea in trespass *quare domum fregit* by A. against B., B. justifies under a writ of *fi. fa.* upon a judgment obtained by B. against A. A. replies, that the writ was *irregularly sued out and prosecuted*, and that, by a judge's order (subsequently made a rule of court) it was ordered that the writ, and the proceedings thereon, should be set aside:—
The replication was held good as sufficiently showing that the writ was set aside for *irregularity*.

This was an action of trespass for breaking and entering the plaintiff's dwelling-house, breaking open and damaging doors, and seizing and converting the plaintiff's goods; and also for breaking and entering a warehouse and office, and seizing and converting other goods of the plaintiff.

The defendant justified under a writ of *testatum fieri facias* for 50*l.* 5*s.* 8*d.* sued out, to wit, on the 5th of February, 1844, upon a judgment obtained by him in this court, on the 4th of December, 1839, against the now plaintiff, for 55*l.* 5*s.* 8*d.*

To this plea the plaintiff replied, that the said writ of *testatum fi. fa.* in the said plea mentioned, and under which the defendant attempted to justify the said trespass, was, to wit, on the said 5th of February, 1844, *irregularly* sued and prosecuted out of this court; and that afterwards,

to wit, on the 1st of April, 1844, by a certain order, then duly made in the said cause, by ERSKINE, J., bearing date, to wit, the said 1st of April, 1844 (and which order was afterwards, to wit, on the day and year last aforesaid, duly made a rule of the said court), it was ordered that the said writ of testamentum fi. fa. issued in the said suit, and the proceedings thereon, should be set aside; as by the said rule and order then remaining in the said court would more fully appear—verification.

To this replication the defendant demurred, specially assigning for causes (amongst others) that it did not appear, in or by the replication, how or in what manner the writ was irregularly sued and prosecuted out of this court; *184] nor did it appear that the defendant was guilty *of any irregularity in suing and prosecuting the said writ out of this court; that the nature and ground of the alleged irregularity ought to have been set forth in the said replication, to enable the court to judge whether the said writ was or was not irregularly sued or prosecuted out of this court; that no issue could be taken on the allegation that the said writ was irregularly sued and prosecuted out of the said court, without leaving it to the jury to determine on the question of the regularity of the proceedings and practice of this court; that it did not appear that the suing and prosecuting of the said writ out of the said court by the defendant in the plea mentioned was irregular; that the replication and the matters therein alleged were an argumentative denial of the existence of the writ in the plea mentioned; and that the replication was in other respects informal, insufficient, and uncertain, &c. Joinder.

Channell, Serjt., in support of the demurrer. The replication is insufficient: it alleges that the writ of testatum fi. fa. was set aside, but not that it was set aside for *irregularity*: it may have been *erroneous*. Many cases may be suggested where writs are set aside upon other grounds than mere irregularity. [CRESSWELL, J. Where, for instance, the proceeding is contrary to good faith. TINDAL, C. J. Or, the writ may be set aside quia improvidè emanavit.] In *Riddell v. Pakeman*, 2 C., M. & R. 30, where, in trespass for false imprisonment, the defendant justified under process of outlawry, and the plaintiff replied that there was no affidavit of debt made and filed, &c., and the defendant rejoined that there was such affidavit, and set out an *irregular* affidavit, and the plaintiff demurred: it was held that the plaintiff was entitled to judgment, trespass not *185] being maintainable *where the process is *irregular* merely, and not void. But, in *Prentice v. Harrison*, 1 Dav. & M. 50, in trespass for assault and false imprisonment, the defendant pleaded a justification under a writ of ca. sa.; the plaintiff replied that the said writ was, after the issuing thereof, and before the commencement of the suit, ordered to be set aside, and was set aside, by order of a judge: and it was held, on special demurrer, that the replication was bad for not distinctly averring that the writ was set aside for irregularity. Lord DENMAN, C. J., there says: "The plaintiff, in his replication, states that the writ of ca. sa

in the plea mentioned, after the issuing thereof, and before the commencement of the suit, was ordered to be set aside, and was set aside, by an order of my brother CRESSWELL. The question is, whether the plaintiff ought not to have gone on to show the ground upon which the learned judge proceeded to order the writ to be set aside. And it is argued, that, for aught that appears upon the face of the plaintiff's pleading, it might have been set aside on account of some defect that would make it erroneous, and that the defendants in that case would not be liable; and an error in the award of execution has been suggested, namely, the issuing of the writ more than a year after the date of the judgment. I think this objection to the plaintiff's replication must prevail, and that the plaintiff should have guarded himself against it by stating that the writ was set aside *for irregularity*." And PATTERSON, J., after alluding to the issuing of a writ more than a year and a day after the date of the judgment, without any scire facias to revive the judgment, asks, "How are we to say that that was not the case here? and, if so, the process being erroneous, and not irregular, the defendants are justified in what they have done under it." *That case is not to be distinguished [*186 from the present. [CRESSWELL, J. Why are we to assume that the writ was erroneous, when we are distinctly told by the replication that it issued irregularly? And, suppose the writ were irregular, and also erroneous, and afterwards set aside by order, would it justify the party?] Here, the writ is stated to have been irregular, but it may also have been erroneous; the plaintiff was bound to show in his replication whether it was set aside on the one ground or on the other. It was his duty to make his answer to the defence pleaded clear and unambiguous.

Byles, Serjt., contra. The replication is sufficient: it states that the writ in the plea mentioned was *irregularly* sued out, and afterwards was set aside by order of a judge, which order was subsequently made a rule of court. The court will not assume that it was set aside for any other than the cause so alleged. *Prentice v. Harrison*, 1 Dav. & M. 50, therefore, has no application.

Channell, Serjt., in reply. The rule of court is not *ipsa lege* a setting aside of the writ. [MAULE, J. It is declared to be no longer a writ.] That supposition is clearly irreconcilable with the two cases referred to. If it be consistent with the replication that the writ was erroneous as well as irregular, the plaintiff should have gone on to show on which ground it was set aside.

TINDAL, C. J. I do not think the present case falls within *Prentice v. Harrison*, 1 Dav. & M. 50, for here is a distinct allegation in the replication that the writ was irregularly issued, and that it was afterwards set aside by a judge's order and rule of court. It seems to me we are not at liberty to assume that the writ was set aside for any *other cause [*187 than which appears upon the face of the replication, and which is a sufficient cause. I think, therefore, we must hold the replication good.

The rest of the court concurring, Judgment for the plaintiff.
Channell, Serjt., prayed leave to amend, stating that the writ had been set aside because it was sued out more than a year and a day after the date of the judgment.

TINDAL, C. J. Then the writ was void, and you could not better yourself by an amendment.

NEWTON v. ROWE and Another. Jan. 21.

In an action for a libel, the defendants pleaded not guilty and several pleas of justification: the plaintiff recovered a verdict upon all the issues, damages three farthings: Held, that by virtue of the 3 & 4 Vict. c. 24, s. 2, he was not entitled to any costs.

THIS was an action upon the case for a libel. The declaration contained four counts, each setting out a different libel. The defendants pleaded, first, not guilty; secondly, a justification of the libel in the first count; thirdly, a justification of the libel set out in the second count; fourthly and fifthly, traverses of allegations in the introductory part of the third count; sixthly, a justification of the libel set out in the third count; seventhly, a justification of the libel set out in the fourth count.

At the trial, before TINDAL, C. J., at the sittings in Middlesex after last Trinity term, a verdict was found for the plaintiff on the issue joined on not guilty, and also on the issues joined on the second and sixth pleas, with two farthings damages, and for the defendants upon the other issues. A rule nisi was afterwards obtained on behalf of the plaintiff, to enter the verdict for him *upon the several issues that were found against him at 188*] the trial: this rule was made absolute by consent, and the verdict was ultimately entered for the plaintiff on all the issues, with three farthings damages. Upon the taxation of costs, the plaintiff claimed to be entitled, under the statute 4 Ann. c. 16, ss. 4, 5, to the costs of and occasioned by the special pleas; but the master declined to allow them, holding that the plaintiff was, by the express words of the 3 & 4 Vict. c. 24, s. 2, deprived of costs, he having recovered less damages than 40s.

Sir T. Wilde, Serjt., now moved for a rule calling upon the defendant to show cause why the master should not tax to the plaintiff the costs of and occasioned by the issues joined on the special pleas. The effect of the 3 & 4 Vict. c. 24, s. 2, (a) is, to deprive the plaintiff of the general

(a) Which enacts, "that, if the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of her majesty's courts at Westminster, or in the court of Common Pleas at Lancaster, or in the court of Common Pleas at Durham, shall recover, by the verdict of a jury, less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or

costs of the cause : but he is still entitled to the costs of the issues found for him. The statute has been held to require a strict construction. Thus, in *Taylor v. Rolfe*, Law Journ. N. S., Q. B. 39, it was held that a plaintiff for whom judgment has been given upon demurrer in an [*189
 *action of trespass, and who subsequently obtains one farthing damages only, on a writ of inquiry, is entitled to the costs of the cause, without a certificate ; the clause in question not applying to judgments upon demurrer, or to inquiries consequent thereon. If, in the present case, the verdict had been for the *defendant* upon not guilty, and for the plaintiff upon the issues joined on the special pleas, the latter would, unquestionably, have been entitled to the costs of the issues found for him. It would therefore be a singular construction of the act to hold that it deprives him of those costs because he has *also* succeeded upon the first issue ; or, in other words, that a defendant who is found *not* guilty of the offence charged, shall be mulcted in the costs of the special pleas ; but that a *guilty* defendant may saddle the plaintiff with the heavy costs of long and intricate pleadings, because the jury have thought fit to estimate the damage sustained by the grievance complained of at a sum below 40s. [CRESSWELL, J. Suppose the defendant had pleaded only a justification, and the jury had found for the plaintiff, damages one farthing, would the latter have been entitled to costs ?] Clearly not. [MAULE, J. Has not this plaintiff recovered by the verdict of a jury less damages than 40s. ? and is not such verdict given on an "issue or issues" tried ?] The damages are given in respect of the trespass : no damages are in any sense found upon the issues raised on the special pleas. (a) CRESSWELL, J. If *the verdict does not entitle the plaintiffs to the costs of the [*190
 issues, what does ?] The verdict is taken severally upon each issue. No verdict could be sustained where the jury had given damages because the proof of the special justification had failed. [MAULE, J. The jury can only find one single amount of damages. ERLE, J. The stat. 4 & 5 Ann. c. 16, s. 5, clearly shows that the plaintiff's right to the costs of issues results from the verdict.]

TINDAL, C. J. The question in this case depends entirely upon the construction to be put upon the words of the 3 & 4 Vict. c. 24, s. 2. That section enacts, "that if the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of her majesty's courts at Westminster, &c., shall recover by the verdict of a jury less

grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

(a) The damages assessed in any action tried, are assessed solely upon the cause or causes of action stated in the declaration, the truth of that statement having been ascertained, either by the affirmative finding of a jury upon a plea traversing such statement, or upon the confession of the defendant, expressly or impliedly contained in a plea in confession or avoidance, the obstacle to such assessment of damages arising out of the matter pleaded in avoidance (whether the statements in the declaration have been traversed or not) having been cleared away by some finding of the jury, or by some judgment of the court upon some issue in law raised upon such matter in avoidance

damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever." Stopping there, the language of the act is general, and free from ambiguity, treating the whole action as the subject-matter with which the legislature is dealing. And the words that follow, "whether it shall be given upon any issue or *issues* tried, or judgment shall have passed by default," clearly seem to contemplate actions in which there are more issues than one, and in which the plaintiff, failing to recover damages to the amount of 40s., shall be disentitled to costs of the whole action. Here, the plaintiff has recovered less than 40s. damages, and therefore he is entitled to no costs.

MAULE, J. I am entirely of the same opinion. The words of the act appear to me to be perfectly clear. It may be that there is the inconvenience suggested in this case, as contrasted with the case of a verdict for the defendant upon the plea of not guilty and for the plaintiff on *191] the justifications. But there the matter may have been of serious amount; whereas here, by the verdict of the jury, it is ascertained to be such that the legislature has thought no action at all should have been brought in respect of it. Other hardships might possibly be suggested. But no doubt the legislature has thought that all these are outweighed by the advantages to result from the discouragement of petty litigation.

CRESSWELL, J. The present case seems to me to fall directly within the clear words of the act. The action is "trespass on the case;" and the plaintiff has recovered, "upon an issue or issues tried," less damages than 40s.: he is therefore not entitled to any costs whatever.

ERLE, J. It appears to me also to be perfectly clear that the statute 3 & 4 Vict. c. 24, s. 2, applies to the present case. The intention of the legislature was to discourage litigation in respect of injuries of small and insignificant amount. This may involve a seeming hardship. But the words of the act are perfectly free from ambiguity, and expressly relate to a case where there is a plurality of issues. The statute of Anne gives costs in respect of the verdict, and of the verdict alone; and it has been held to apply in cases of much greater hardship than the present. I remember a case, though I do not find it reported, where the plaintiff obtained a verdict on the general issue for one shilling, and the defendant had all the costs of a special justification. Rule refused.

*192] *BARNES v. WHITE and Another. Jan. 24.

By a local act "for amending the roads and highways in the Isle of Wight," the commissioners were empowered to erect turnpikes and toll-houses, and to demand and take certain tolls from persons passing through the same; and power was also given to them to raise money for the purposes of the act, upon loans secured by mortgage of the tolls during the continuance of the act. The time for which the act was to be in force expired in 1834. By the 4 & 4

W. 4, c. 10, "all and every act and acts of parliament for making, amending, and repairing any turnpike roads in Great Britain which would expire with the then present or the next session of parliament," are continued:—*Held*, that the local act was thereby continued and kept alive as to so much thereof as related to turnpike roads, notwithstanding it contained provisions applicable to other objects.

The forty-first section of the general turnpike act, 3 G. 4, c. 126, enacts amongst other things, "that if any person shall fraudulently or forcibly pass through any such *toll-gate* with any horse, cattle, beast, or carriage, or shall do any other act whatever, in order or with intent to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall, for every such offence, forfeit and pay any sum not exceeding 5*l*." The 141st section directs that all penalties by the act authorized to be imposed, shall be levied, together with the costs attending the information and conviction, by distress and sale of the offender's goods, by warrant, the overplus to be returned, after payment of the penalty and the charges of the distress and sale; and it directs that the penalty shall be paid, one moiety to the informer, and the other moiety to the treasurer or treasurers to the trustees or commissioners for repairing and maintaining the road on which such offence shall have been committed. And sect. 148 enacts, "that the forms of proceeding relative to the several matters contained in this act, which are set forth and expressed in the schedule thereunto annexed, may be used upon all occasions, with such additions and variations only as may be necessary to adapt them to the particular exigencies of the case, and that no objection shall be made or advantage taken for want of form in any of such proceedings by any person or persons whomsoever."

A conviction under the above acts stated that J. B., on, &c., in the parish of C., "on the turnpike road before then made and then being under the authority of the local act, with a certain carriage, to wit, a cart, drawn by one horse, did unlawfully, fraudulently, and forcibly pass through a certain *toll-gate* then and there legally situate and being under the authority of the said act, by reason whereof the payment of a certain toll, to wit, the sum of 3*d*., then and there legally due, demanded, and payable, under the authority of the said act, by and from the said J. B., for and in respect of the said carriage so drawn as aforesaid, was avoided, contrary to the form of the statute 3 G. 4, c. 126."

The warrant thereon stated that the said J. B., on, &c., in the parish of C. aforesaid, "with a certain carriage, to wit, a cart, drawn by one horse, *the said cart then and there having two wheels, and the felloes of such wheels being then and there of less breadth than three inches, to wit, of the width of two inches*, did unlawfully, fraudulently and forcibly pass through a certain *toll-gate* then and there situate and being, by means whereof the payment of a certain toll, to wit, the sum of 3*d*., then and there legally due and payable by and from the said J. B. for and in respect of the said carriage so drawn as aforesaid, was avoided, contrary to the statutes in such case made and provided:" and it directed that the penalty be paid, one moiety to the informer, and the other moiety to "the treasurer of the commissioners for amending the roads and highways in the Isle of Wight, being the place where the said offence was committed:"

Held—first, that the conviction, which followed the form given in the schedule, was sufficient. Secondly, that it was no objection that the warrant, in describing the offence, did not follow the precise words of the conviction, inasmuch as it did so in substance.

Thirdly, that the warrant disclosed a legal cause of forfeiture.

Fourthly, that the application of the penalty in the warrant, was a sufficient compliance with the statute, though by the form given in the schedule, it was directed to be paid, one moiety to the informer, and the other moiety "to the surveyor of the turnpike road where the said offence, &c., happened."

Fifthly, that the adjudication as to the costs was sufficient.

Sixthly, that no demand of the penalty previous to the issuing of the warrant was necessary.

TRESPASS for breaking and entering the plaintiff's close in the parish of Carisbrooke, in the Isle of Wight, in the county of Southampton, called "The *Timber Yard," and seizing and taking [*193 certain of his goods and chattels, to wit, eleven pieces of wood called deals, then lying and being in the said close, and carrying away and converting the same. Plea, not guilty "by statute;" whereupon issue was joined.

The cause came on for trial at the last summer assizes for the county

of Southampton, on the 15th of July, before PATTESON, J., and a special jury, when a verdict was found for the plaintiff, with 2l. 9s. 6d. damages, subject to the opinion of the court upon the following case :—

The defendants are, and at the respective times of the making by them of the conviction, and of the signing by them of the warrant of distress, and of the committing of the trespass hereinafter mentioned, were, two of her *194] majesty's justices of the peace for the county of *Southampton, acting in and for the division of the Isle of Wight, in the said county.

On the 3d of June, 1843, the plaintiff, having been duly summoned to answer an information in respect of the subject-matter of the conviction hereinafter mentioned, appeared, with his attorney, before the defendants, and objected that the local act hereinafter mentioned had expired, and therefore that the defendants had no jurisdiction to hear the complaint. The defendants overruled the objection, and proceeded to hear the case, as set out in the conviction hereinafter mentioned; and thereupon the plaintiff was convicted before the defendants, acting as such justices.

The following is a copy of the conviction.

Isle of Wight in the } Be it remembered, that, on the 23d day of
county of Southampton. } June, in the sixth year of the reign of her
majesty, Queen Victoria, and in the year of our Lord 1843, James Barnes,
of the parish of Carisbrooke, in the Isle of Wight, in the county of South-
ampton, builder, is convicted, on the oath of Charles Newnham, a credi-
ble witness, before us, two of her majesty's justices of the peace, acting
in and for the said county of Southampton, and for the division of the
Isle of Wight, in the said county: for that he, the said James Barnes, on
the 30th day of May last, in the parish of Carisbrooke aforesaid, in the
Isle of Wight and county aforesaid, *on the turnpike road* before then made,
and then being under the authority of an act of parliament made and
passed in the fifty-third year of the reign of his late majesty, King George
the Third, for amending the roads and highways in the Isle of Wight,
with a certain carriage, to wit, a cart, drawn by one horse, did unlawfully,
fraudulently, and forcibly pass through a certain toll-gate, then and there
legally situate and being, under the authority of the said act; by reason
*195] whereof the payment of a certain toll, to wit, the sum *of 3d., then
and there legally due, demanded, and payable under the authority
of the said act, by and from the said James Barnes, for and in respect of
the said carriage so drawn, as aforesaid, was avoided, contrary to the
form of a statute made in the third year of the reign of his late majesty,
King George the Fourth, intituled "An act to amend the general laws
now in being for regulating turnpike roads in that part of Great Britain
called England:" and we do hereby declare and adjudge that the said
James Barnes hath forfeited, for the said offence, the sum of 2l. 2s. Given,
under our hands and seals, the day and year first above written.

" R. WALTON WHITE. (L. S.)

" T. COOKE. (L. S.)'

The plaintiff refused to pay the said sum of 2*l.* 2*s.*, which by the conviction he was adjudged to have forfeited ; and, on the 5th of June, 1843, caused the defendants to be served with a notice of such refusal, of which the following is a copy :—

To the Rev. Richard Walton White, Thomas Cooke, and Henry Percy Gordon, Esqrs.

“I hereby give you notice that I refuse to pay the penalty and costs which you adjudged against me on Saturday last, the 3d day of June instant, under a conviction for avoiding payment of the toll at the Node Hill turnpike gate near Newport, on the 30th day of May last, on the ground that you had no power to inflict such penalty or to take cognisance of the said matter, under any act of parliament whatever : and I further give you notice, that, in case a distress-warrant is issued and executed for levying the said penalty and costs, I shall adopt legal proceedings by one or more actions on the case against you, and also against such justices of the peace who signed such distress-warrant; or such of you *or them as I shall be advised. Witness my hand this fifth [*196 day of June, 1843.

“(Signed) JAMES BARNES.”

Notwithstanding this notice, the defendants afterwards, on the 10th of the same month of June, issued a distress-warrant under their hands and seals ; of which warrant the following is a copy :

“Isle of Wight, in the } To the constables of the hundred of the
county of Southampton. } West Medene, in the Isle of Wight, in the
county of Southampton, and all other constables whom it doth or may
concern, and specially to Thomas Hayter Chase :

“Whereas, James Barnes, of the parish of Carisbrooke, in the Isle of Wight, in the county of Southampton, builder, was on the 3d day of June, now instant, convicted before and by us, the undersigned, two of the justices of our lady the queen assigned to keep the peace of our said lady the queen within the same county, and also to hear and determine divers felonies, trespasses, and other misdeeds within the same county done and committed, on the oath of Charles Newnham, a credible witness ; for that he the said James Barnes, on the 30th day of May now last past, at the parish of Carisbrooke aforesaid, in the isle and county aforesaid, with a certain carriage, to wit, a cart, drawn by one horse, the said cart then and there having two wheels, and the felloes of such wheels being then and there of less breadth than three inches, to wit, of the width of two inches, did unlawfully, fraudulently, and forcibly pass through a certain toll-gate then and there situate and being, by means whereof the payment of a certain toll, to wit, the sum of 3*d.*, then and there legally due and payable by and from the said James Barnes for and in respect of the said carriage so drawn as aforesaid, was avoided, contrary to the statutes in such case made and provided ; by reason *whereof the said James Barnes hath forfeited and become

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liable to pay, and we adjudged that he the said James Barnes shall forfeit and pay the sum of 2*l.* 2*s.*, to be distributed as hereinafter mentioned; which said sum he the said James Barnes hath refused to pay: These are, therefore, in her majesty's name to charge and command you to levy the said sum of 2*l.* 2*s.* by distress of the goods and chattels of the said James Barnes, and if within four days after such distress by you taken the said sum, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the goods and chattels so by you distrained, and out of the money arising by and from such sale, you do pay one moiety of the said sum of 2*l.* 2*s.* to Mark Morgan, of Newport, in the said Isle, who informed us of the said offence, and the other moiety thereof to the treasurer of the commissioners for amending the roads and highways in the Isle of Wight, being the place where the said offence was committed, returning the overplus, on demand, to him the said James Barnes (the reasonable charges of taking, keeping, and selling, the said distress being deducted); and, if sufficient distress cannot be found of the goods and chattels of the said James Barnes whereon to levy the said sum of 2*l.* 2*s.*, that then you certify the same to us, together with this our warrant. Given, under our hands and seals, at the Guildhall in Newport in the Isle of Wight, this 10th day of June, 1843.

"R. W. WHITE, (L. s.)

"T. COOKE, (L. s.)

	£	s.	d.
"Levy fine	2	2	0
"Costs	0	5	0
	£2	7	0"

*198] "In pursuance, and under the authority, of this warrant, the trespasses complained of in the declaration were committed.

The plaintiff, disputing the jurisdiction of the defendants to make such conviction or to issue such warrant, and objecting also to the form both of the said conviction and warrant, on the 30th of the same month of June caused them to be served with a notice of action, of which the following is a copy:

"To R. W. White, clerk, and T. Cooke, Esq., justices of the peace for the county of Southampton, acting in and for the division of the Isle of Wight.

"I, James Barnes, of the parish of Carisbrooke, in the Isle of Wight, in the county of Southampton, builder, do hereby, according to the form of the statute in such case made and provided, give you, and each of you, notice that I shall, by my attorney, Mr. H. R. of Newport, in the Isle of Wight aforesaid, at, or soon after, the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of her majesty's court of Common Pleas at West

minster against you at my suit, and proceed thereupon according to law: for that you did, on the 24th day of June, 1843, with force and arms, break and enter my timber-yard, situate and being in Wallem Terrace, in a certain street or highway called Node Hill, in Carisbrooke aforesaid, and did then and there seize and take certain goods and chattels belonging to me, to wit, eleven pieces of wood, called deals or planks, of great value, to wit, of the value of 10*l.*, and then converted and disposed thereof to your own use; by reason whereof I the said James Barnes was greatly disturbed and disquieted in the peaceable and quiet possession of my said timber-yard, and was deprived of the use and benefit of my said goods and chattels; and for that you *other wrongs then and there did, against the peace of our lady the now queen, and to my damage of 50*l.* Dated, this 30th of June, 1843. [*199]

(Signed) "JAMES BARNES."

This action was accordingly commenced on the 4th of August, 1843.

The pleadings in the action, and also an act passed in the 53 G. 3, [c. xcii.], intituled "An act for amending the roads and highways in the Isle of Wight,"—copies of which accompany the case,—are to be deemed and taken as part thereof, and are to be referred to, if necessary.

If the court shall be of opinion that the plaintiff was entitled to recover in this action, then the verdict found for him is to stand: but, if the court shall be of a contrary opinion, then judgment of nonsuit is to be entered.

Channell, Serjt., (with whom was *Butt*,) for the plaintiff. The main question for consideration in this case is, whether or not the local act of 53 G. 3, c. xcii., is continued and kept alive by the 4 & 5 W. 4, c. 10, the general highway act. The title of the local act is, "An act for amending the roads and highways in the Isle of Wight." By sect. 20, a discretionary power is given to the commissioners to erect gates, bars, or turnpikes, in, upon, or across the several roads or highways within the parishes and places named in the act. Sect. 21 vests in the commissioners the right and property of all the turnpikes, toll-houses, and other buildings to be erected by virtue of the act, with the grounds, fences, and appurtenances thereto respectively belonging: sect. 22 empowers them to take certain tolls: sect. 23 enacts, that, in case any person, subject to the payment of toll, shall neglect or refuse to pay the same, the collector may seize and distrain any horse, or the bridles, &c., *(except the bridles or reins apart from any horse or beast,) and, if such tolls, and the reasonable charges of such distress, be not paid within three days, may sell the same, &c.: and by sect. 24 disputes respecting tolls and charges are to be settled by a justice of the peace. The twenty-ninth section provides, amongst other things, that no toll shall be demanded or taken from any person or persons who shall pass through any of the turnpikes or toll-gates authorized to be erected by virtue of the act, with any wagon, wain, cart, or other carriage, not [*200]

being such as is liable to be charged to the assessed taxes, "having the sole, or bottom, of the felloes of the wheels, of the breadth or gauge of three inches or more, and which shall not be drawn with more than one horse;" and that, "in case any person or persons shall use any such wagon, &c., on any of the said roads or highways, drawn as aforesaid (except as aforesaid,) without having compounded with the said commissioners for the same, every such person or persons shall, for every offence, forfeit and pay any sum not exceeding 10*l.*, to be recovered and applied as any other penalty under this act is directed to be recovered and applied." Sect. 30 imposes a penalty not exceeding 10*l.* for an *evasion* of tolls. Sect. 43 enables the justices to make a rate upon the occupiers of lands, &c., within the several parishes mentioned in the act, to pay for the purchase of land for widening or diverting roads, agreeably to the general highway act of the 13 G. 3, c. 78. Sect. 53 *contains provisions for converting statute labour into a money payment.* And by sect. 93 it was enacted that the act should be in force and have continuance for and during the term of twenty-one years, and from thence to the end of the then next session of parliament. [TINDAL, C. J. Is there any provision in the act enabling the commissioners to borrow

*201] money upon the security of the tolls? If there be, that will be 'a circumstance not to be lost sight of in considering whether the act is continued or not.] The thirty-ninth section enables the commissioners to raise money not exceeding 4000*l.*, and, as a security for the same, to assign over, or mortgage, the tolls thereby granted, *for any term during the continuance of the act.* Now, by the 4 & 5 W. 4, c. 10, it is enacted, "that all and every act and acts of parliament for making, amending, and repairing any turnpike roads in Great Britain, which will expire with the present or the next session of parliament, shall be, and the same is and are hereby, continued until the 1st of July, 1836, or, if parliament shall then be sitting, until the end of the then session of parliament." The object of this enactment was, to continue in force such acts relating exclusively to turnpike roads as would expire during the then present, or the next, session, and not to interfere, in any way, with acts having in view other objects besides, and independent of, the regulation of turnpike roads. The 53 G. 3, c. xcii., therefore, being addressed to other matters, is not within the purview and operation of that act. Assuming, however, that that act is still in force, the warrant in this case is substantially defective. The local act contains no clause creating the offence described in the warrant. [CRESSWELL, J. The conviction professes to found itself upon the general turnpike act, 3 G. 4, c. 126.] The forty-first section of that act, amongst other things, enacts, that, if any person shall fraudulently or forcibly pass through any such toll-gate, with any horse, cattle, beast, or carriage, or shall do any other act whatever in order or with intent to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such per-

son shall, for every such offence, forfeit and pay any sum not exceeding 5*l*.: and the 141st section points out the mode of enforcing the penalty. Now, the conviction and warrant declare that the plaintiff has forfeited and become liable to pay, but the former contains no adjudication of payment; nor is it shown to whom the payment is to be made. The conviction is in the nature of a judgment in a *qua tem* action, and should be substantially like it. The conviction states that the plaintiff was convicted "on the oath of Charles Newnham, a credible witness," but it does not show that Charles Newnham was the informer; and, if we turn to the warrant, we find that the informer was Mark Morgan. Where the amount of the penalty, and the party to whom it is to be paid, are ascertained by the act under which it is imposed, those facts need not appear on the face of the conviction; but, where those matters are not ascertained and fixed by the act, it is otherwise. Thus, the stat. 42 G. 3, c. 119, against illegal lotteries, directs the penalty to be distributed, one-third to the King, one-third to the informer, and one-third to the person apprehending or securing the offender. In *The King v. Sarah Seale*, 8 East, 568, a conviction directing the penalty to be distributed as the law directs, without ascertaining to whom the last third was to be paid, (the person being uncertain,) was held to be bad. [TINDAL, C. J. Here, the statute gives a form of conviction and warrant, and sect. 148 expressly provides "that the forms of proceeding relative to the several matters contained in the act, which are set forth and expressed in the schedule thereunto annexed, may be used upon all occasions, with such additions and variations only as may be necessary to adapt them to the particular exigencies of the case, and that no objection shall be made or advantage taken for want of form in any such proceedings by any person or persons whomsoever." It would be strange, indeed, if the defendants should be held to have done wrong in following the form prescribed.] Neither the *148th section, nor the form given in the schedule, [*203 removes the plaintiff from this objection, which is one of substance. The party ought not to be left in a state of uncertainty as to the person to whom the penalty is to be paid. [TINDAL, C. J. Suppose he had paid it "forthwith" to the justice's clerk, would not that have been a good payment? Possibly it would: but he is at all events not liable to a distress until there has been a clear default. Then, there is a fatal variance between the warrant and the conviction. The conviction states that the plaintiff, on a day named, in the parish of *Carisbrooke*, on the *turnpike road* before then made and then being under the authority of an act of parliament made and passed in the 53 G. 3 for amending the roads and highways in the Isle of Wight, "with a certain carriage, to wit, a cart, drawn by one horse, did unlawfully, fraudulently, and forcibly pass through a certain toll-gate then and there legally situate and being under the authority of the said act, 53 G. 3, c. xcii.; by reason whereof the payment of a certain toll, to wit, the sum of 3*d*., then and there legally

due, demanded, and payable, under the authority of the said act, by and from the said James Barnes, for and in respect of the said carriage so drawn as aforesaid, was avoided, contrary to the form of a statute," &c., 3 G. 4, c. 126. The warrant states, that the plaintiff, on the day named, in the parish of Carisbrooke aforesaid, "with a certain carriage, to wit, a cart, drawn by one horse, *the said cart then and there having two wheels, and the felloes of such wheels being then and there of less breadth than three inches, to wit, of the width of two inches*, did unlawfully, fraudulently, and forcibly pass through a certain toll-gate then and there situate and being, by means whereof the payment of a certain toll, to wit, the sum of 3d.

*204] then and there *legally due and payable by and from the said James Barnes for and in respect of the said carriage so drawn as aforesaid, was avoided, contrary to the statutes in such case made and provided,*" &c. The warrant, therefore, does not follow the conviction. It does not state that the toll-gate was upon a turnpike road; and it omits other matters that are stated in the conviction, and contains matter not appearing on the conviction.—The warrant itself is bad; it does not, upon the face of it, disclose any legal cause of forfeiture. A good conviction will not support a bad commitment; *Wickes v. Clutterbuck*, 2 Bingh. 483, 10 J. B. Moore, 63. The warrant should have distinctly stated that the toll-gate was by or on a turnpike road. [TINDAL, C. J. The warrant states the offence in the very words of the 41st section of the 3 G. 4, c. 126. ERLE, J. The word "toll-gate" is used throughout the act in the sense of "turnpike-gate."] "Toll-gate" does not necessarily mean a gate at which toll is payable under a turnpike act; there are other descriptions of toll to which it would be equally applicable: and it is to be observed that here the right to toll is not given by the 3 G. 4, c. 126, but by the local act. No offence, therefore, is committed to render a party liable to the penalty under the 3 G. 4, c. 126, unless the right to the toll is established under the local act; and there can be no right to demand toll under the local act, unless at a gate on or by a turnpike road within the 3 G. 4, c. 126.—The warrant contains an adjudication of payment of the penalty, but the conviction does not. In the former the penalty is directed to be paid, one moiety to the informer, and the other moiety "to the treasurer of the commissioners for amending the roads and highways in the Isle of Wight, being the place where the said offence was

*205] committed;" whereas, the 141st section of the 3 G. 4, *c. 126, directs the payment to be made, "one moiety thereof to the informer or person suing for or recovering the same, and the other moiety to the treasurer or treasurers to the trustees, or commissioners for repairing and maintaining *the road on which such offence shall have been committed* and applied and disposed of for the purposes of such road and of the act;" and the form given in the schedule (No. xx.) directs the payment of the second moiety to be made to "the surveyor of the turnpike road where the said offence happened."—Also, the adjudication is insufficient with

reference to the costs. The warrant, after directing the levy and the appropriation of the penalty, directs that "the overplus be returned to the plaintiff, on demand, the reasonable charges of taking, keeping and selling the said distress being deducted;" whereas, the only costs authorized by sect. 141, to be levied, are "the costs attending the information and conviction."—Lastly, there does not appear to have been any demand of the penalty and costs previously to the issuing of the warrant. [CRESSWELL, J. No formal demand was necessary. The 141st section of the 3 G. 4, c. 126, authorizes a distress "in case such fines, penalties, and forfeitures shall not be *forthwith* paid upon conviction."]

Byles, Serjt., (with whom was *Barstow*,) *contra*, was desired by the court to confine himself to the fourth point, namely, whether or not the warrant was void by reason of the mention of "toll-gate" only, without describing it as being situate by or on a *turnpike road*. It is clear, from a reference to the 20th sect. of the local act, that there is not a road in the whole island upon which the commissioners have not the power to erect a toll-gate. The warrant follows, as nearly as the circumstances would permit, the form given, and describes the offence in the very words of the act. The word "such," *in sect 41, creates some [*206 ambiguity; but, upon a careful examination, it will be found to have no antecedent, and to be wholly without meaning, and may therefore be rejected. Taking the whole of the warrant together, and giving it a reasonable and sensible construction, it is clear the offence is described with a sufficient degree of accuracy. The use of the precise form is not imperatively required, as in *Davison v. Gill*, 1 East, 64. The plaintiff was guilty of evading the toll, by passing through a gate which the commissioners had authority to erect; and the warrant expressly states that the toll was *legally* due and payable in respect of his so passing through the gate. There is no foundation for the objection. Besides, the 144th section provides, that, "where any distress shall be made for any sum or sums of money to be levied by virtue of this act, or any other act for repairing, amending, or maintaining any turnpike road, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any default or want of form in any proceeding relating thereto."

Channell, Serjt., in reply. The forms given by the statute are not to be idly adopted without reference to the exigencies of the particular case. Taking the two acts of 53 G. 3, c. xcii., and 3 G. 4, c. 126, to be incorporated together, it is quite clear that no offence is committed unless there has been an evasion of toll by passing through a turnpike-gate or a toll-gate situate upon a turnpike road; and this is not stated upon the face of the warrant.

TINDAL, C. J. It appears to me that the defendants in this case are entitled to the judgment of the court. The first objection that has been urged on the part of the plaintiff is, that the local act, 53 G. 3, c. xcii.

207*] is "not continued and kept alive by the statute 4 & 5 W. 4, c. 10. But, looking at the general scope and object of the last-mentioned act, I am of opinion that it does continue the former. One object of the 4 & 5 W. 4, c. 10, was, to prevent persons who had advanced money upon the security of the tolls authorized to be raised under local turnpike acts, from being deprived of that security by the expiration of the act under which the money was borrowed. Now, the thirty-ninth section of the 53 G. 3, c. xcii., empowers the commissioners appointed for carrying the act into effect, "from time to time to borrow and take up at interest any sum and sums of money as they shall judge necessary for the purposes of the act, not exceeding in the whole the sum of 4000*l.*, and by writing under their hands and seals, or under the hands and seals of any three or more of them, to assign over or mortgage the tolls thereby granted, or any part thereof, and the several turnpikes and toll-houses to be erected on the said road, for any term during the continuance of the act, as a security for the repayment of such sum or sums of money, with interest for the same, to the person or persons who should advance and lend such money, his, her, or their executors, administrators, and assigns." It seems to me that it would be a most mischievous construction of the 4 & 5 W. 4, to hold that it does not extend to the local act in question. The title of the statute is, "An act for continuing until the 1st of June, 1836, the several acts for regulating the turnpike roads in Great Britain, which will expire with the present or next session of parliament." The act then recites that "it is expedient that the several acts for making, amending, and repairing the turnpike roads in Great Britain, which will expire with the present session or the next session of parliament, should be continued for a limited time:" and it proceeds to enact "that all and

*208] every act and "acts of parliament for making, amending, and repairing any turnpike roads in Great Britain, which will expire with the present or the next session of parliament, shall be and the same is and are hereby continued until the 1st of June, 1836, or, if parliament shall then be sitting, until the end of the then session of parliament." It is true, the local act is not limited expressly and exclusively to the making, amending, and repairing of turnpike roads, but also extends to the substitution of a money payment in lieu of the duty called statute-labour, in the several parishes referred to in the first section. But, inasmuch as one object, and the main object, of the local act is, the "amending the roads and highways in the Isle of Wight," it seems to me to fall within the words and the spirit of the general act. And this construction is fortified by the second section, which in terms excludes from the operation of the continuing statute certain local acts which otherwise might have been held to fall within the general words of the first section. The second objection arises upon the form of the conviction, which, it is said, contains no adjudication of payment. To this the answer is, that it follows the form of conviction given in the schedule (No. xix.) to the general

turnpike act, 3 G 4, c. 126, the 148th section of which enacts "that the forms of proceeding relative to the several matters contained in that act, which are set forth and expressed in the schedule thereunto annexed, may be used upon all occasions, with such additions and variations only as may be necessary to adapt them to the particular exigencies of the case, and that no objection shall be made or advantage taken for want of form in any such proceedings by any person or persons whomsoever." Another objection that has been relied on is, that there is a variance between the conviction and the warrant, inasmuch as the former states that the plaintiff, on a certain day "with a certain carriage, to wit, [209 a cart, drawn by one horse, did unlawfully, fraudulently, and forcibly pass through a certain toll-gate," &c.; and the latter, that the plaintiff "with a certain carriage, to wit, a cart, drawn by one horse, *the said cart then and there having two wheels, and the felloes of such wheels being then and there of less breadth than three inches, to wit, of the width of two inches*, did unlawfully, fraudulently, and forcibly pass through a certain toll-gate," &c. To this I answer that this is no variance, but simply that the warrant is more full and explicit than the conviction, and contains words that might well have been omitted. A fourth objection is, that the warrant itself is void in law, for that it does not, upon the face of it, state any legal cause of forfeiture. If that be so, then, undoubtedly, the warrant will afford no justification for the alleged trespass. But it appears to me that there is no foundation for this objection. It is said that the warrant does not show that the toll-gate, which the plaintiff is charged with having fraudulently passed through, was situate upon a turnpike road. But it states that which appears to me to be equivalent; for it goes on—"by means whereof the payment of a certain toll, to wit, the sum of 3d., then and there *legally* due and payable by and from the plaintiff for and in respect of the said carriage so drawn as aforesaid, was avoided, contrary to the statutes," &c. Now, I agree that the local act is to be considered as virtually incorporated in the 3 G. 4, c. 126. The forty-first section of that act enacts, that, if any person shall fraudulently or forcibly pass through any toll-gate, with any horse, cattle, beast, or carriage, or shall do any other act whatever in order, or with intent, to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall, for every such offence, forfeit and pay any sum not exceeding 5*l*. The first answer, therefore, to this objection is, that the warrant follows the very words used in the act; and, [210 if so, it is clearly sufficient; for the direction in the schedule (No. xx.) is, that the offence is to be described "particularly in the words of the statute, as near as may be." Then, supposing (as is properly stated) that the local act is incorporated in the general act, "toll-gate" must be considered as equivalent to "turnpike-gate:" for, in sect. 22 of the former, we find them used as synonymous terms. It therefore seems to me that this objection is sufficiently answered. The fifth objec-

tion is, as to the mode of stating the appropriation or apportionment of the penalty in the warrant. The answer is, that the form given by the 3 G. 4, c. 126, has, in this respect, been followed as nearly as the exigencies of the case would permit. It is true the warrant does not direct the application of the penalty in the precise manner stated in the schedule; the form in the schedule directing the amount of the penalty to be paid, one half to the informer, and the other half to "the surveyor of the turnpike road where the said offence, &c. happened;" and the warrant directing that one moiety be paid to the informer, and the other moiety "to the treasurer of the commissioners for amending the roads and highways in the Isle of Wight, being the place where the said offence was committed." That, however, makes no real difference; because it was impossible literally to follow the form in the schedule; and any defect of form is cured by the 148th section. The objection taken as to the costs has very properly been abandoned. And the last objection, namely, that it did not appear that there had been any demand of the penalty, is answered by a reference to the 141st section of the 3 G. 4, c. 126, which renders the party liable to a distress if the forfeiture be not *forthwith* paid upon conviction. For these reasons, I am of opinion that none of the *211] objections that have been urged against this *warrant can be allowed to prevail; and, consequently, that our judgment must be for the defendants.

CRESSWELL, J.(a) I am entirely of the same opinion. With respect to the main question, I cannot help expressing my surprise that it should have been considered a matter at all in doubt, whether or not the 53 G. 3, c. xcii., was continued by the 4 & 5 W. 4, c. 10. It has been contended that the local act was not so continued, because it related to something more than the mere regulations of roads and highways. It is not, however, the less a turnpike act, because it contains provisions applicable to something else. One portion of the act, namely, that which related to the highways on the island, was on the eve of expiring; and it is impossible to doubt that its continuance by the 4 & 5 W. 4, c. 10, was within the contemplation of the legislature. Assuming, then, that the plaintiff was wrong in his refusal to pay toll, the next question is, whether the proceedings of the defendants, the justices, were regular. Several objections in point of form have been taken to the conviction and the warrant, some of which are answered by a reference to the 148th section of the 3 G. 4, c. 126, and the schedule annexed to that act, which preclude advantage being taken of such defects, where the prescribed forms have been followed. It has been urged that there is a material variance between the conviction and the warrant; or, in other words, that there is no sufficient conviction to sustain the warrant. I see no such variance between the conviction and the warrant as will have the effect contended for. It is true that the offence is more fully stated in the latter than in

(a) Maule, J., was absent.

the former. But it is enough if they substantially agree. In *Daniell v. Philipps*, 1 C., M. & R. 662, 5 Tyrwh. 292, which was an action of trespass for false imprisonment *against two magistrates, the defendants gave in evidence a conviction of the plaintiff, under the [*212 7 & 8 G. 4, c. 30, s. 24, for "unlawfully and maliciously damaging," &c., a quantity of rushes, for which they adjudged the plaintiff to pay the sum of 10s. as a *reasonable compensation*, and 6s. 6d. for costs; and, in default of immediate payment, the plaintiff to be imprisoned *for one calendar month, unless the said sums should be duly paid*. The warrant of commitment stated the offence to be, that the plaintiff *unlawfully trespassed on land* in the occupation of D. Thomas, and cut down and carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. *penalty*, and the jailer was ordered to detain him *for the space of one month, or until he should be delivered by the due order of law*: and it was held that the conviction sufficiently supported the commitment. There was much more reason for saying that there was a variance in that case than in the present. Here, the principal objection to the form of the warrant is, that it does not upon the face of it show any offence committed. But, upon looking at the act, I am satisfied that this objection is not well founded, and that the warrant does show an offence. The local act uses the words toll-gate and turnpike-gate as synonymous. The warrant states that the plaintiff, "on the 30th day of May now last past, at the parish of Carisbrooke, in the isle and county aforesaid, with a certain carriage, to wit, a cart, drawn by one horse, the said cart then and there having two wheels, and the felloes of such wheels being then and there of less breadth than three inches, to wit, of the width of two inches, did unlawfully, fraudulently, and forcible pass through a certain toll-gate then and there situate and being, by means whereof the payment of a certain toll, to wit, the sum of 3d., then and there legally due and payable by and from the plaintiff for and in respect of the said carriage *so drawn as aforesaid, was avoided, contrary [*213 to the statutes in such case made and provided," &c. It describes the offence as the evasion of a toll legally payable by the plaintiff for passing through a toll-gate upon the road in question; and it describes the offence in the form prescribed by the 3 G. 4, c. 126, following it as nearly as the exigencies of the case will permit.

ERLE, J. It appears also to me that the defendants in this case are entitled to judgment. The main question that has been argued, is, whether or not the stat. 53 G. 3, c. xcii., was continued and kept in force by the 4 & 5 W. 4, c. 10. The argument on the part of the plaintiff has been that the local act does not fall within the act of extension because it is not an act merely for making, amending, or repairing a turnpike road, but that it also contains provisions of a different nature. It seems to me to be impossible to come to any other conclusion than that the portion of the local act which does relate to the amending the

roads and highways in the Isle of Wight, is continued. If this were not so, it would operate as a grievous hardship and injustice, seeing that parties who have lent money to the commissioners upon the credit of the tolls, would be deprived of all security. Several objections in point of form have been urged against the conviction and the warrant, some of which are disposed of by a reference to the 148th section of the 3 G. 4, c. 126, and the forms given in the schedule to that act. On this part of the case, the main struggle has been, that there is (as it is said) no sufficient statement of the offence on the face of the warrant. It appears to me, however, that the offence is stated in the very words of the 41st section of the 3 G. 4, c. 126. Had the warrant alleged that the plaintiff passed through a turnpike-gate, there would have been no difficulty: and, looking through the several sections of the local act, I find that "toll-gate" is used throughout as synonymous with "turnpike-gate." I entirely agree with the rest of the court in thinking that the defendants are entitled to judgment. Judgment of nonsuit.

BARNES v. PRICE. Jan. 24.

A declaration in *assumpsit* charged the defendant, in the first two counts, as the acceptor of two bills of exchange, and the other counts, for money lent, money paid, interest, and money due upon an account stated. The defendant pleaded, as to the first and second counts, and as to 852*l.* 9*s.* 6*d.*, parcel of the moneys in the third and subsequent counts mentioned, that the bills were respectively drawn and accepted for and on account of the sums they severally represented, parcel of the said sum of 852*l.* 9*s.* 6*d.*, and for no other consideration; that, after they respectively became due, and before the commencement of the suit, the defendant and one P. transferred certain stock of the value of 416*l.* 17*s.* 6*d.*, in full satisfaction and discharge of the sum of 416*l.* 17*s.* 6*d.*, parcel, &c., and of the causes of action in the declaration, so far as they related to the said sum of 416*l.* 17*s.* 6*d.*; that the defendant gave the plaintiff, and the plaintiff took and received from the defendant, three several bills of exchange for 145*l.* 4*s.* each; and that the plaintiff accepted and received the stock and the bills in full satisfaction and discharge of the said sum of 852*l.* 9*s.* 6*d.*, and of the causes of action in the declaration mentioned, so far as they related thereto. To this plea the plaintiff replied *de injuriâ*.

Held, that, inasmuch as the plea set up matter in discharge, and not in excuse, the replication *de injuriâ* was improper.

ASSUMPSIT. The first count was upon a bill of exchange for 223*l.* 1*s.*, dated the 18th day of July, 1832, drawn by the plaintiff upon, and accepted by, the defendant, and payable three months after date. The second was upon a bill for 107*l.* 15*s.* 2*d.*, dated the 29th of November, 1833, also drawn by the plaintiff upon, and accepted by, the defendant, and payable at four months after date. The declaration also contained counts for money lent, money paid, interest, and for money found due upon an account stated.

*215] The defendant pleaded, fifthly, as to the first and second counts of the declaration, and as to 852*l.* 9*s.* 6*d.*, parcel of the moneys in the third and subsequent counts mentioned—that the bill of exchange in the first count mentioned was so drawn and accepted as in

the first count mentioned, for and on account of the sum of 223*l.* 1*s.*, parcel of the said sum of 852*l.* 9*s.* 6*d.*, and that there never was any consideration for the acceptance or payment of the said bill other than the said sum of 223*l.* 1*s.*, parcel as aforesaid; and that the bill of exchange in the said second count mentioned, was so drawn and accepted as in the said second count mentioned for and on account of the sum of 107*l.* 15*s.* 2*d.*, further parcel of the said sum of 852*l.* 9*s.* 6*d.*, and that there never was any consideration for the acceptance or payment of the last-mentioned bill other than the said sum of 107*l.* 15*s.* 2*d.*, parcel as aforesaid; that, after the respective days on which each of the said bills became due and payable according to the tenor and effect thereof, and before the commencement of the suit, to wit, on the 30th of April, 1838, the defendant and one Daniel Price transferred from the names of the defendant and the said Daniel in the books of the governor and company of the Bank of England a certain amount of three per centum Consolidated Bank Annuities, to wit, 500*l.* of such annuities, and of great value, to wit, of the value of 416*l.* 17*s.* 6*d.*, which amount of bank annuities was then, with the further amount of 34*l.* 15*s.* 2*d.*, of the like annuities, standing in the said books in the names of the defendant and the said Daniel as surviving limited executors of Anne Keel, widow, deceased, in full satisfaction and discharge of the sum of 416*l.* 17*s.* 6*d.*, parcel of the said sum of 852*l.* 9*s.* 6*d.*, and of the causes of action in the declaration mentioned so far as they related to the said sum of 416*l.* 17*s.* 6*d.*, and of all damages by the plaintiff sustained by reason *of the [216 said causes of action, so far as they related to the said sum of 416*l.* 17*s.* 6*d.*, parcel as aforesaid: that, after the accruing of the causes of action, so far as they related to the said sum of 852*l.* 9*s.* 6*d.*, and after the days on which the said two bills respectively became due as aforesaid, and before the commencement of this suit, to wit, on the 30th of April, 1838, the plaintiff made in writing, and the said Daniel Price, at the request of the defendant, accepted, and the defendant endorsed to the plaintiff, and the plaintiff took and received from the defendant and the said Daniel, so accepted and endorsed as aforesaid, three several bills of exchange, severally dated on the day and year last aforesaid, and severally directed to the said Daniel Price: (each for 145*l.* 4*s.*, and payable respectively at three, six, and nine months after date, to the order of the plaintiff:) that, after the days upon which the bills in the declaration mentioned severally became due as aforesaid, and after the accruing of the causes of action in the declaration mentioned, so far as they related to the said sum of 852*l.* 9*s.* 6*d.*, and before the commencement of the suit, the plaintiff accepted and received of and from the defendant and the said Daniel the said transfer of the said sum of 500*l.* three per centum per annum Consolidated Bank Annuities in full satisfaction and discharge of the said sum of 416*l.* 17*s.* 6*d.*, parcel of the said sum of 852*l.* 9*s.* 6*d.*, and of the causes of action in the

declaration mentioned so far as they related to the said sum of 416*l.* 17*s.* 6*d.*, and of all damages by the plaintiff sustained by reason of the said causes of action so far as they related to the said sum of 416*l.* 17*s.* 6*d.*, parcel as aforesaid : and that the said three several bills of exchange for 145*l.* 4*s.* each were so as aforesaid drawn accepted, and endorsed, taken and received by the plaintiff, the said Daniel, and the defendant respectively as *217] aforesaid, *for and on account of *the residue of the said sum of 852*l.* 9*s.* 6*d.**, and of the causes of action in the declaration mentioned so far as they related to such residue, and of all damages by the plaintiff sustained by reason of the several causes of action, so far as they related to the said residue—verification.

The sixth plea was similar to the fifth, save that the three bills for 145*l.* 4*s.* each were alleged to have been “drawn, accepted, and endorsed, taken and received by the plaintiff, the said Daniel, and the defendant, *in full satisfaction and discharge* of the residue of the said sum of 852*l.* 9*s.* 6*d.*, and of the causes of action in the declaration mentioned, so far as they related to such residue, and of all damages by the plaintiff sustained by reason of the said causes of action so far as they related to the said residue.”

To these two pleas, so far as they respectively related to the first and second counts of the declaration, the plaintiff replied *de injuriâ*.

To the replication to the fifth plea, so far as it related to the first and second counts, the defendant demurred specially, assigning for causes, that the said plea, so far as it related to the first and second counts, was not a plea in excuse, and that the replication commonly called *de injuriâ* was inapplicable to it, and that the general form of traverse adopted in the replication was improper, and that the plaintiff ought to have traversed some traversable point distinctly, and ought not generally to have said that the defendant broke his promises without the cause by him alleged: that the replication professed to deny some cause supposed in the replication to be alleged in the plea for breach of promises; whereas the said fifth plea alleged no such cause; and the matter of defence alleged in the plea was alleged to have taken place after the days on which the bills became due, and therefore the plea necessarily admitted a breach before *218] any *matter of excuse arose: that the plea was a plea in discharge, and that the replication did not properly traverse any thing alleged in the plea, inasmuch as the matters which were alleged in the plea were not a cause for the breaches, as supposed in the replication: that the replication was double, in this, that it traversed, or was intended to traverse, both the transfer of the stock in part satisfaction, and the endorsement of the bills *for and on account of* the residue: and that the replication was double, in this, that it denied that the consideration for the bills declared on was the consideration alleged in the plea, and also denied the matter of discharge.

There was a similar demurrer to the replication to the sixth plea, so far as it related to the first and second counts, save that the words "in satisfaction of" were substituted for those above in italics. Joinder.

Talfourd, Serjt., in support of the demurrers. [TINDAL, C. J. The plaintiff's attorneys have, in violation of the rule of the court,(a) set out in the paper-books the whole of the pleadings, although the demurrers have relation only to two of the pleas and the replications thereto. They must pay the costs.] The ground of the demurrers to the replications to the fifth and sixth pleas, is, that, those pleas being pleas in discharge, and not consisting of mere matter of excuse, the general replication *de injuriâ* is inapplicable. [ERLE, J. The question is, whether *de injuriâ* is a good replication to a plea of accord and satisfaction.] That it is not, is clearly *established by the recent case of *Purchell v. Saller*, [*219 1 Q. B. 197, 1 Gale & D. 682, 9 Dowl. P. C. 517; S. C. in error, 1 Q. B. 209, 1 Gale & D. 693. The court called on

Manning, Serjt., to support the replications. Though there is some difficulty in applying the rule in *Crogate's* case, 8 Co. Rep. 66 b, since the courts have decided that the general replication *de injuriâ* may be pleaded in assumpsit and debt, still it is submitted that there are authorities to warrant the adoption of that form of replication in the present case. Thus, in *Whitehead v. Walker*, 1 Dowl. N. S. 600, where to an action by the assignees of a fourth endorsee against the first endorser of a foreign bill of exchange, the defendant pleaded, that, after the endorsement to the third endorsee, and before the endorsement to the fourth, the bill was refused acceptance, and was protested, and that the defendant had not notice of the non-acceptance and protest, and that the bankrupt, as well as the said endorsees, had notice: it was held that *de injuriâ* was a good replication. [CRESSWELL, J. There, the matter set up in the plea was matter of excuse for the non-performance by the defendant of his contract; here, the plea admits that the plaintiff had a good cause of action, but states that it has since been satisfied; it is therefore matter of discharge, and not of excuse.] In *Mitchell v. Cragg*, 10 M. & W. 367, 2 Dowl. N. S. 252, to a declaration against the acceptor of a bill of exchange for 16l. 12s., drawn by F. & G., and endorsed by them to the plaintiff, the defendant pleaded—first, that, after the bill became due, F. & G., being then the holders, applied to the defendant for payment of the bill; that the defendant paid them 7l. 2s., which, together with the price of a horse which the defendant had sold to F. & G., and the price of which it was *agreed between them should be set off and [*220 allowed against the defendant's acceptance, F. & G. accepted

(a) "In cases of demurrers to part only of declarations or other subsequent pleadings, those parts only to which such demurrers relate shall be copied into the demurrer-books; and, if any other parts be copied, the master shall not allow the cost thereof on taxation, either as between party and party, or as between attorney and client." Reg. Gen., K. B. Hilary, 8 & 9 G. 4; 1 Mann. & R. 662, 7 B. & C. 642; C. P., Hilary, 8 & 9 G. 4; 4 Bing. 549, 1 M. & P. 401; Exch. Michaelmas, 9 G. 4; 2 Y. & J. 530.

in satisfaction and discharge of the bill; and that the bill was not endorsed to the plaintiff until after the said satisfaction and discharge, and after it became due—secondly, that before the bill came into the possession of the plaintiff, it was endorsed in blank by F. & G. to C. & Co.; and that, after it became due, it being then in the hands of C. & Co., F. & G. gave C. & Co. another bill, accepted by them, for the same amount, which C. & Co. received on account of the first-mentioned bill, and which was paid by F. & G. at maturity; that, after the second bill was so given, the defendant paid to F. & G. 7l. 2s., &c. (as in the first plea); that, at the time of the giving of the second bill by F. & G. as aforesaid, and at the time of the said settlement between the defendant and F. & G., the bill in the declaration mentioned remained in the hands of C. & Co., and was not endorsed to the plaintiff until after the giving of the second bill by F. & G., nor until after it became due. To each of these pleas the plaintiff replied, “that the said plea, and the statements therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact,” concluding to the country. And it was held, first, that the replication was bad on special demurrer, as being an informal *de injuriâ*; secondly, that the pleas were bad in substance, because they did not show that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill of exchange. [CRESSWELL, J. In that case there was no default as to the plaintiff: the alleged satisfaction was made before the bill was endorsed to the plaintiff.]

The learned serjeant prayed leave to amend, which was granted, on the usual terms.

Rule accordingly.

*221] *The costs of the amendment having been taxed and demanded of the plaintiff, and not paid, and the plaintiff having neglected to avail himself of the leave to amend,

Tatfourd, Serjt., in the following term, prayed for judgment on the demurrers. [CRESSWELL, J. We cannot give judgment without looking into the matter. If we pronounce judgment rashly, there may be a writ of error.]

Cur. adv. vult.

TINDAL, C. J., on the last day of Easter term, said: We have looked at the pleadings in this case, and we think the fifth and sixth pleas clearly disclose matter in excuse and not in discharge, and therefore that *de injuriâ* is not a proper form of replication.

Judgment for the defendant.

JOSEPH v. BUXTON. Jan. 24.

The court refused to stay execution in an action upon a judgment for a sum exceeding 20*l.* recovered in a suit originally brought for a debt not amounting to that sum, upon a suggestion that the proceeding was in fraud of the 7 & 8 Vict. c. 96, s. 57.

THE plaintiff had brought an action against the defendant upon a bill of exchange for 15*l.*, in which action he obtained judgment for damages and costs, together amounting to 24*l.* He afterwards commenced an action upon this judgment, and, upon an issue joined on nul tiel record, obtained judgment.

Dowling, Serjt., now moved for a rule calling upon the plaintiff to show cause why the proceedings on the last-mentioned judgment should not be stayed. He submitted that the action upon the judgment was a "fraudulent evasion of the provisions of the 7 & 8 Vict. c. 96.(a) [^{*222} TINDAL, C. J. How can we say that the sum recovered in this action does not exceed 20*l.*? CRESSWELL, J. This case has recently been before the Court of Exchequer; and I think they declined to interfere.

On a subsequent day, *Dowling* stated that the Court of Exchequer, in the case alluded to, *Hopkins v. Freeman*, 13 M. & W. 372, had intimated an opinion to the effect suggested; and consequently

He took nothing.

(a) The fifty-seventh section of which, reciting, that "whereas it is expedient to limit the present power of arrest upon final process," enacts, "that, from and after the passing of this act, no person shall be taken or charged in execution upon any judgment obtained in any of her majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment."

BOYD and Another v. LETT. Jan. 24.

In *assumpsit* for not accepting a quantity of guano, the declaration alleged that the plaintiffs were ready and willing to deliver the guano to the defendant according to the terms of the contract:—*Held*, sufficient, on special demurrer; and that it was not necessary for the plaintiffs to aver a tender or offer to deliver, or that the defendant dispensed with a tender.

ASSUMPSIT. The declaration stated, that, on the 10th of July, 1844, the defendant agreed to buy of the plaintiffs, and the plaintiffs, at the request of the defendant, then agreed to sell to the defendant, a large quantity of goods, to wit, all the then remaining parcel of guano, then being about forty-three tons, brought by the Magnet from Ichaboe, and then landed at Fenning's wharf, upon the following terms; that is to say, the price to be 8*l.* per ton, at wharf-delivery weights, the defendant to be allowed the same tares and draft as are allowed in [^{*223} the department of her majesty's customs; the said goods to be accepted by the defendant, and the price to be paid by the defendant to the plaintiffs, at the expiration of fourteen days from the time of the making of the

said contract; the brokerage to be one per cent.; the delivery charges to be paid by the defendant, and the said goods to be delivered by the plaintiffs to the defendant on the defendant's paying the said price at or before the expiration of the said fourteen days, at the option of the defendant; and no discount to be allowed on such payment: that, in consideration thereof, and that the plaintiffs, at the request of the defendant, had then promised the defendant to deliver the said goods to the defendant, according to the aforesaid terms, and in all respects to perform and fulfil the said terms on the part of the plaintiffs to be performed and fulfilled, the defendant then promised the plaintiffs to accept the said goods of and from the plaintiffs, and to pay them for the same according to the aforesaid terms; that, although the plaintiffs, from the time of the making of the said promise, for and during and until and at the expiration of fourteen days from the time of the making the said contract, *were ready and willing to deliver* the said goods to the defendant according to the said terms, and to perform and fulfil the said terms in all things on the part of the plaintiffs to be performed and fulfilled; whereof the defendant during all that time had notice; and although the said period of fourteen days elapsed before the commencement of the suit; yet the defendant, not regarding his said promise, did not nor would accept the said goods, or any part thereof, of or from the plaintiffs, or pay them for the same according to the aforesaid terms, but wholly neglected and refused so to do; and, in consequence of the defendant's refusal to *224] accept the said goods, the plaintiffs were compelled to re-sell the said goods, and, in so doing, the plaintiffs were put to great costs and charges, amounting to a large sum, to wit, the sum of 10*l.*, in and about effecting and preparing for such re-sale; and that, in consequence of such refusal as aforesaid, they were compelled to incur a debt to a large amount, to wit, to the amount of 10*l.*, for the warehousing of the said goods, and were deprived of great gains and profits, to wit, the sum of 10*l.*, which they would otherwise have made by employing the money agreed to be paid for the said goods if the defendant had accepted and paid for the said goods.

To this declaration, the defendant demurred specially, assigning for causes—that it did not contain any averment that the plaintiffs at any time tendered or offered to deliver the goods in the declaration mentioned to the defendant, or that the defendant dispensed with the said tender and offer, as the declaration should have done, according to the terms of the contract therein declared on; that the mere averment that the plaintiffs were ready and willing to deliver the said goods to the defendant was not sufficient; and that the declaration was in other respects defective, &c.

The plaintiff joined in demurrer.

Channell, Serjt., in support of the demurrer. If the declaration had alleged an *offer* to deliver the goods in question, that might have sufficed, notwithstanding the defendant's right to inspect and examine the quan-

tity and quality; *Isherwood v. Whitmore*, 10 M. & W. 757, 2 Dowl. N. S. 548. An allegation of a tender of goods is not supported by proof of a delivery or offer to deliver closed casks, said to contain them; but they should be tendered in such a way that the purchaser may have a reasonable opportunity of inspecting *them, and of ascertaining whether what he has bargained for is presented for his acceptance; *Isherwood v. Whitmore*, 11 M. & W. 347. [CRESSWELL, J. To sustain the allegation of readiness and willingness to deliver, the plaintiffs would be bound to prove that they were ready and willing to deliver the identical goods contracted for.] [*225]

Byles, Serjt., contra. The allegation of readiness and willingness to deliver, imports the ability, as well as the will, to deliver the article contracted for: it is quite superfluous to aver an actual tender. In *Isherwood v. Whitmore*, 10 M. & W. 757, 2 Dowl. N. S. 548, which was an action of assumpsit on a promise by the defendants to pay 250*l.*, on the plaintiff delivering up certain goods, to wit, 2000 hats, on which he had a lien, the declaration alleged that the plaintiff was ready and willing, and tendered and offered to deliver up the hats, and to abandon his lien, but that the defendants refused to accept them: the defendant pleaded that the tender was of two closed casks, which the plaintiff represented as containing the hats, which was the readiness, and willingness in the declaration mentioned; but that the defendants did not then, or at any other time, know, nor could they ascertain, the contents of the said casks, or whether the same contained the said hats; nor had they any opportunity of inspecting the contents of the said casks; and, although the plaintiff was requested by them to open the casks, and allow them to examine the contents thereof, and although the plaintiff had notice that they were willing to accept the hats and to pay the money, yet the plaintiff refused to permit the casks to be opened, or to allow them any inspection of the contents thereof. This plea was held bad, on special demurrer, as being an argumentative denial of *the tender. The defendants in that case afterwards traversed the tender as alleged in the declaration, and the court held that that allegation was not sustained by proof of an offer to deliver the hats in closed casks.(a) In *Rawson v. Johnson*, 1 East, 203, which was an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it was held sufficient for the plaintiff in his declaration to aver such request, and that he was *ready and willing* to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without alleging an actual tender of the price. "Under this averment," said Lord ELLENBOROUGH, "the plaintiffs must have proved that they were prepared to tender and pay the money if the defendant had been ready to have received it, and to have delivered the goods: but it cannot be necessary, in order to entitle them to maintain their action, that they

(a) 11 M. & W. 347.

should have gone through the useless ceremony of laying the money down in order to take it up again. It would be repugnant to common sense to require it." That case is precisely in point; as is also the recent case of *Jackson v. Allaway*, 6 M. & Gr. 942, 7 Scott, N. R. 875, 1 D. & L. 919. There, in an action for the breach of an agreement to purchase and take to certain quantities of iron-mine, the plaintiff averred, that, although he had raised, gotten, and prepared, and was ready and willing, *and then tendered and offered*, to sell and deliver to the defendants the stipulated quantities; yet the defendants did not purchase or take, or pay for the same. The defendants pleaded, that the plaintiff did not *tender or offer* to sell or deliver to the defendants the iron-mine in the declaration mentioned: and this plea was held bad, as being a traverse of an **im-*
**227]* material allegation. *Pickford v. The Grand Junction Railway Company*, 8 M. & W. 372, 9 Dowl. 766, 2 Railw. Ca. 592, is an authority to the same effect.

Channell, Serjt., admitting that *Jackson v. Allaway* was a conclusive authority against him, prayed and obtained leave to amend.

Rule accordingly.(a)

(a) See *Granger v. Dacre*, 12 M. & W. 431.

ROSS v. MOSES. Jan. 25.

Certain shares in a joint-stock company were deposited by B. with A., to be sold by A. in case B. neglected to provide for two bills accepted by A. for B.'s accommodation. B. having failed to provide for the bills, A. sold the shares, and gave notice of that fact to B., who refused to execute a transfer to the purchaser. In an action for money had and received, brought by A. to recover the amount paid by him to take up one of the bills, B. pleaded in bar the deposit and sale of the shares. Upon an issue taken on this plea:—*Held*, that B. was entitled to the verdict, notwithstanding his refusal to give effect to the sale, by executing a transfer.

ASSUMPSIT, for money paid, and for money due upon an account stated.

The defendant pleaded, first, non assumpsit; secondly, payment before action brought; thirdly, as to 30*l.*, parcel of the moneys in the first count of the declaration mentioned, that the plaintiff, before the making of the promise in that count mentioned as to the said sum of 30*l.*, parcel &c., to wit, on the 18th of July, 1839, accepted a certain bill of exchange for the accommodation, and at the request, of the defendant, for the purpose of enabling the defendant to raise money thereon for his own use and benefit, that is to say, a certain bill of exchange bearing date, on, &c., and then drawn by the defendant upon the plaintiff, for the payment
**228]* by the plaintiff to the order of the defendant of a *certain sum of money, to wit, 30*l.*, three months after the date thereof, which period had elapsed before the making of the promise as to the said sum of 30*l.*, parcel, &c.; and the plaintiff then, to wit, on the said 18th of July, 1839, delivered the said bill so by him accepted as aforesaid to the

defendant for the purpose aforesaid: that, on the occasion, and at the time, of the plaintiff so accepting and delivering the said bill to the defendant for the accommodation of the defendant as aforesaid, the defendant, at the request of the plaintiff, deposited with the plaintiff, and the plaintiff then received of and from the defendant, divers, to wit, two shares of him the defendant in the capital of a certain public joint-stock company, called the Monmouthshire Iron and Coal Company, that is to say, the certificates of the said shares duly granted and delivered to the defendant, and certifying the right and interest of the defendant to and in the said shares, of great value, to wit, of the value of 100*l.*; and it was thereupon then agreed by and between the plaintiff and the defendant, that, in case the plaintiff as the acceptor of the said bill, when the same should become due, should be called upon, and forced, and obliged, to pay the said bill, he the plaintiff should be at liberty to sell and dispose of the said shares, and apply and appropriate the proceeds of the same, or so much thereof as should be sufficient in that behalf, in payment and satisfaction of the money which he should be so called upon, and forced and obliged, to pay upon, and in discharge of, the said bill: that, the said bill being so accepted and delivered to him as aforesaid, for the purpose aforesaid, he the defendant did thereupon raise money on the said bill, to wit, the sum of 30*l.*, and did then endorse and negotiate the said bill for and on account of the said sum of 30*l.*, and to and for his the defendant's own use and benefit: that afterwards, *and when [229 the said time for the payment of the said bill had elapsed, and the said bill had become due, to wit, on the 21st of October, 1839, the plaintiff, as the acceptor of the said bill, was called upon and forced and obliged to pay, and did then pay, to the then holder of the said bill, the said sum of 30*l.* therein specified, in discharge of the said bill: that the sum of money in the first count mentioned as to the said sum of 30*l.*, parcel thereof, was the same sum of money which the plaintiff was so called upon, and forced and obliged to pay, and did pay in discharge of the said bill as aforesaid: that, upon the plaintiff being so called upon, &c., to wit, on the day and year last aforesaid, he the plaintiff, under and by virtue of and in pursuance of the said agreement so in that behalf made as aforesaid, did *sell and dispose of* the said shares of the defendant, the certificates whereof were so deposited with the plaintiff as aforesaid, upon the terms aforesaid, for a large sum of money, to wit, 30*l.*, and did then, under and by virtue and in pursuance of the said agreement, apply, appropriate, and accept the proceeds of the said sale, to wit, the said sum of 30*l.*, which was then paid to and received by the plaintiff as and for the price and value of the said shares, upon the said sale and disposal thereof, (the same being sufficient in that behalf,) in payment and satisfaction of the said money which he was so called upon, &c., to wit, the said sum of 30*l.*, parcel, &c., and in full satisfaction and

discharge of all causes and rights of action against the defendant in respect thereof.

The plaintiff joined issue on the first plea, traversed the second. and to the third, replied that he did not sell or dispose of the said snares of the defendant in that plea mentioned, *modo et forma*.

*230] The cause was tried before CRESSWELL, J., at the *sittings in London after last Trinity term, when the following facts appeared in evidence :—

In July, 1839, the defendant obtained from the plaintiff two accommodation acceptances for 45*l.* and 30*l.* respectively at three months' date, depositing with him as security two shares of the nominal value of 50*l.* each in the Monmouthshire Iron and Coal Company, upon an express agreement that the plaintiff should be at liberty to sell the shares in case the defendant should neglect to provide for the bills at least ten days before they arrived at maturity. Two days before the bills became due, viz. on the 19th of October, 1839, the plaintiff wrote to the defendant, telling him, that, as he had not provided for them according to his engagement, he had been compelled to send the shares into the market, and that he could only obtain 15*l.* each for them. And on the 21st, he again wrote to the defendant to apprise him of his having sold the two shares to one Hartley for 30*l.*, and applied the proceeds in retiring one of the bills, and enclosed the sold-note. The defendant, in reply, remonstrated with the plaintiff for having sold the shares at so low a price, asserting that they were worth 50*l.* each; and, when applied to for that purpose, he refused to execute a transfer of them. Some further correspondence took place between the parties, when the plaintiff offered to get back the shares for 40*l.* This offer was not accepted.

On the part of the plaintiff it was insisted that this evidence did not show an absolute sale of the shares, so as to sustain the third plea. The jury, however, returned a verdict for the defendant on that issue; and the learned judge reserved leave to the plaintiff to move to enter a verdict for the plaintiff for 30*l.*, if the court should be of opinion that he was entitled to recover.

*231] **Talfourd*, Serjt., in Michaelmas term last, accordingly obtained a rule nisi. He submitted that that which took place did not amount to a sale and disposal of the shares within the meaning of the third plea.

Byles, Serjt., (with whom was *Austin*,) now showed cause. The transaction between the plaintiff and Hartley amounted to a sale of the shares in the sense in which those terms are used in the third plea. After his letter of the 21st of October, it was not competent to the plaintiff to say that they were not sold, notwithstanding the defendant's refusal to execute a transfer; for which Hartley, the buyer, would have a remedy against him in equity.

Talfourd, Serjt., in support of his rule. There has been no valid sale

and transfer of these shares. The defendant throughout protested against and repudiated the sale, and refused to do what was required to give validity to it. As against him, therefore, there clearly has been no sale. [CRESSWELL, J. If an agent duly authorized sell an estate, will it be the less a sale because the principal improperly refuses to execute a conveyance?'] A sale can only mean that which effectually vests in the vendee the property in the thing sold.

COLTMAN, J.(a) The pleadings in this case admit the plaintiff's right to sell the shares: it is only the fact of a sale having actually taken place that is disputed. It appears, however, from the evidence and the correspondence between the parties, that a sale has taken place, which the purchaser, who has retained the shares *for five years, might have [232 enforced. And it does not appear that there has been any agreement to rescind that sale. For these reasons I think the issue on the third plea was properly found for the defendant.

ERLE, J. It appears from the pleadings that the defendant deposited with the plaintiff a saleable article, with authority, in a given event, to sell it: and the only question is whether or not the plaintiff has, in point of fact, exercised that right. His own letter of the 21st of October, 1839, in terms, states that he has. It does not appear that the sale has ever been rescinded, or that the plaintiff has not had the purchase-money in his hands down to the present time. Many instances might be put where the sale is complete though no transfer has been made. Suppose one holding the title deeds of a house, with authority to sell,(b) finds a purchaser, and receives from him the purchase-money, and hands over to him the title deeds. That, I should hold to be a valid sale, even though the owner of the house refused to execute a legal conveyance. That is precisely the situation of this defendant, if a transfer of these shares was necessary; of which there was no evidence.

CRESSWELL, J., concurred, observing that, if the plaintiff recovered in this action, the defendant would *have a difficulty in getting back [233 the shares from Hartley.(c) Rule discharged.(d)

(a) Tindal, C. J., was absent, being engaged on the crown jewels' case.

(b) An agent, with authority to sell, may be a person duly authorized to complete a sale by transferring the property in the subject of sale by conveying or delivering it in the name of the principal, or he may be a person authorized to contract that his principal shall convey or deliver, &c., in which case the sale is incomplete until the principal has so transferred the property; it being of the essence of the contract *emptio venditio*, that the vendor should do all acts necessary to enable the vendee to possess and enjoy the subject. Vide *Pothier, Traité du Contrat de Vente*, No. 42—48.

(c) Supposing the issue upon the replication to the third plea to have been found for the plaintiff, the necessity for getting back the shares in order to relieve the defendant from the inconvenience of paying his debt twice—viz., in the price of the shares and in the amount of the verdict—would have been a necessity of his own creating.

(d) The plea in this case containing a sufficient confession of the cause of action, the plaintiff would be entitled to judgment unless it appeared judicially to the court that the plea was good in law and true in fact. Upon the motion for entering a verdict for the plaintiff, no objection could be taken to the sufficiency of the plea, on the ground that the shares were not subjects of sale or on any other ground. The only question which could be raised was, whether the evi-

dence supported the allegations contained in the plea and traversed by the replication, in the sense in which those allegations are to be read upon the record. As by the terms of the contract set out in the plea, the plaintiff was to be at liberty to sell the shares and to apply the proceeds in a particular way, it is evident that the sale contemplated was such a sale as would entitle and enable the plaintiff to receive such proceeds. But although the plaintiff did in fact obtain, by anticipation, the sum which he would have been entitled to receive when the sale should have been perfected by a transfer of the shares, he never did become so entitled or so enabled.

GOODALL v. POLHILL. Jan. 25.

A., in London, to whose care a bill, bearing the endorsement of B., at Bruges, had been referred, "in case of need," paid it *supra* protest, for B.'s honour, and immediately gave B. notice, and sent the bill to him. B. endorsed the bill to A., and returned it to him by the next post, and A. on the same day caused notice of the dishonour to be given to the drawer. —*Held*, that the notice was in time.

ASSUMPSIT, by the endorsee against the drawer, of a bill of exchange for 120*l.*, dated the 30th of October, 1843, and drawn upon, and accepted by, one Brander, payable three months after date to the order of the defendant. The declaration alleged an endorsement by the defendant to one Latour, and by Latour to the plaintiff.

*234] The defendant pleaded two pleas—one traversing the *allegation that the bill was duly presented to the acceptor for payment; the other, traversing the allegation that the defendant had due notice of the non-payment.

The cause was tried before CRESSWELL, J., at the second sitting in London in Michaelmas term last. It appeared that the bill in question was endorsed by the defendant, the drawer, to Latour, and by Latour to De Vos Ryland & Co., of Bruges, who wrote upon it before negotiating it, "In case of need, apply to Mr. Goodall." The bill was duly presented when it became due, viz., on the 2d of February, 1844, by Messrs. Masterman & Co., the bankers, for Rothschild the holder, and was dishonoured. It was on the same day protested for non-payment. On the 3d, Goodall, the plaintiff, paid it for the honour of De Vos Ryland & Co., to whom it was sent by the next post. De Vos Ryland & Co. endorsed the bill and sent it back by return of post to the plaintiff, who received it on the 8th of February, and on the same day, by his attorney, Mr. Wright, gave the defendant notice of the dishonour.

On the part of the defendant, it was contended that the notice of dishonour was not in time; for that the plaintiff ought to have given it on the 3d of February, and was not justified in sending the bill over to De Vos Ryland & Co.

The learned judge was of opinion that the notice was in time; and he accordingly directed the jury to find a verdict for the plaintiff, reserving to the defendant leave to move to enter a nonsuit, if the court should entertain a contrary opinion.

Shoe, Serjt., in Michaelmas term last, obtained a rule nisi accordingly.

He submitted, that, if the plaintiff was the agent of De Vos Ryland & Co., for the purpose of paying the bill, he was agent for the purpose of giving notice of dishonour; or, at all events, that De Vos Ryland & Co. should themselves have given *notice, instead of returning the bill to the plaintiff to do so; *Daly v. Slatter*, 4 C. & P. 200. He further submitted that the plaintiff, having paid the bill for honour, thereby became invested with all the rights of an endorsee, and as such had no claim to rely on the title of De Vos Ryland & Co.: he cited *Mertens v. Winnington*, 1 Esp. N. P. C. 112, Chitty on Bills, 9th edit. p. 509, and the 159th section of the Code de Commerce. [MAULE, J., referred to 1 Mann. & Ryl. 398, n. (a), in which the laws of several foreign states with respect to the effects of payment supra protest are collected.](a) [*235]

Channell and Byles, Serjts., now showed cause. The plaintiff, having paid the bill supra protest, had a right to look for repayment either to De Vos Ryland & Co., or to any of the other prior parties to the bill. *Woodthorpe v. Lawes*, 2 M. & W. 109, is an authority to show that this notice would have been sufficient, provided De Vos Ryland & Co. had been the parties suing. The real question is, whether the plaintiff had a right to adopt their title, and sue in his own name. All that the law requires as to notice of dishonour is, that it shall be given within a reasonable time; and that reasonable time is held to be the next day after the dishonour, in the case of an inland bill, and the next practicable mail, in the case of a foreign bill. The plaintiff clearly was justified in sending the bill to Bruges. It is every day's practice, that an additional day's time is gained where the bill is in the hands of a banker.(b) In *Firth v. Thrush*, 8 B. & Cr. 387, 2 Mann. & Ryl. 359, the endorsee of a bill of exchange, dishonoured by the acceptor, being ignorant of the place of residence of one *of the endorsers, employed an attorney to give notice to him and the other prior endorsers; the attorney, after inquiry, having received information of this endorser's place of residence, on the following day consulted his client, and on the third day sent notice of the dishonour of the bill; and it was held that the notice was sufficient. "If," said Lord Tenterden, "Pownal, the agent of the plaintiff, for the purpose of giving notice of dishonour, had a right to take a day to consult his client under the special circumstances of the case, the notice was sufficient. I think he had. If the letter had been sent to the principal, he would have been bound to give notice on the next day; but, it having been sent to the agent, he was not bound to give notice on the following day. A banker who holds a bill for a customer, is not bound to give notice of dishonour on the day on which the bill is dishonoured. He has another day; and, upon the same principle, I think the attorney in this case was entitled by law to be allowed a day [*236]

(a) These authorities were not noticed in the subsequent argument and judgment, at which Maule, J., was not present.

(b) See *Alexander v. Burchfield*, 3 Scott, N. R. 555, and the cases there cited.

to consult his client." [CRESSWELL, J. When did Goodall in this case become an endorsee?] When the bill was returned to him by De Vos Ryland & Co. He was entitled to claim to be repaid by the parties on whose account he made the payment: and he had also a right to have recourse to the other parties on the bill prior to De Vos Ryland & Co.: but he was not bound to make his election until he had had an opportunity of communicating with his principals. No doubt, De Vos Ryland & Co. might have given notice to the defendant, and brought the action in their own names: and the plaintiff had a right to ascertain whether or not they would adopt that course. [CRESSWELL, J. The question is, whether the plaintiff could pass by the title he acquired by payment under protest, and sue upon the new title he acquired by the return of the bill from De Vos Ryland & Co.,—whether his situation is altered by

*237] his having already once held the bill under circumstances *which entitled him to sue upon it.] The defendant is not prejudiced by what has taken place. The plaintiff made the payment as agent for De Vos Ryland & Co. Reliance will probably be placed on the 159th section of the Code de Commerce; but, upon examination, it will be found to have no application here. The previous section provides, that "Une lettre de change protestée peut être payée par tout intervenant pour le tireur ou pour l'un des endosseurs. L'intervention et le paiement seront constatés dans l'acte de protêt ou à la suite de l'acte."(a) And sect. 159 proceeds: "Celui qui paie une lettre de change par intervention, est subrogé aux droits du porteur, et tenu des mêmes devoirs pour les formalités à remplir. Si le paiement par intervention est fait pour le compte du tireur, tous les endosseurs sont libérés. S'il est fait pour un endosseur, les endosseurs subséquents son libérés. S'il y a concurrence pour le paiement d'une lettre de change par intervention, celui qui opère le plus de libérations est préféré. Si celui sur qui la lettre était originairement tirée, et sur qui a été fait le protêt faute d'acceptation, se présente pour la payer, il sera préféré à tous autres."(b) [CRESSWELL, J.

*238] The meaning of that is, *that he who pays supra protest, for the honour of a party to the bill, puts himself in the place of a holder under the person for whose honour he makes the payment.] The rule is similarly laid down in Naugier on Bills of Exchange. No doubt, if the plaintiff, when he paid the bill, had chosen to place himself in the cha-

(a) "A bill of exchange protested, may be paid by any person who chooses to intervene on behalf of the drawer or of an endorser. The intervention and the payment are to be noticed in or under the protest." With this agrees the Spanish "*Código de Comercio*," No. 526, 527.

(b) "The party who pays a bill of exchange by intervention, becomes clothed with the rights of the holder, and becomes subject to the same obligations with respect to the formalities necessary to be observed. If the payment by intervention is made on account of the drawer all the endorsers are discharged; if it is made on the behalf of the endorser, the subsequent endorsers are discharged. If several persons are desirous of paying a bill of exchange by intervention, the person by reason of a payment by whom the greatest number of parties will be discharged, is to be preferred; if the person on whom the bill was originally drawn, and upon whose default it has been protested for want of acceptance, is desirous to pay it, he is to be preferred to all others." *Acc. Código de Comercio*, No. 530, 533.

acter of an endorsee, he would have been subject to all the liabilities incident to that character. It would be extremely dangerous to hold that one who pays a bill for honour is bound to give notice as if he were a party, and is incapable, under any circumstances, of acquiring a new title so as to be entitled to sue upon it. There is no authority whatever for such a position.

Shee, Serjt., in support of his rule. The rule undoubtedly is as stated, that the notice of dishonour must be given within a reasonable time; *Beveridge v. Burgis*, 3 Campb. 262. Assuming that the plaintiff was the agent of De Vos Ryland & Co. throughout the whole transaction, and was justified in returning the bill to his principals, they should have given notice to the drawer promptly; instead of returning the bill to Goodall, they should have sent notice at once to the defendant. [CRESSWELL, J. No such point was made at the trial: the only question raised was, whether or not the delay in sending the bill to Bruges was justifiable.] Then, was Goodall the agent of De Vos Ryland & Co. for that purpose? [CRESSWELL, J. I know no distinction in this respect between an ordinary agent and a banker agent.] The real point is, whether, if he became a party to the bill by paying it, Goodall was not bound at once to give notice of dishonour to the drawer. In *Mertens v. Winnington*, 1 Esp. N. P. C. 112, it was distinctly held, that, where a person takes up a bill of exchange for the honour of any one *whose name is upon it, he becomes an endorsee of the bill, and entitled to all remedies against those whose names are on it. [ERLE, J. Is not that rather too wide a proposition? He has the rights and remedies of the endorser for whom he pays the bill, if he chooses to put himself in that position.] In Chitty on Bills, 9th edit. p. 509, it is said, that, "Although, with respect to other debts, a stranger who has no interest in them does not, by paying them, entitle himself to the rights of a creditor, unless he have the consent of the debtor to such payment, yet, with regard to a bill of exchange, a stranger who pays it *supra protest*, for the honour of the bill, or, generally, becomes an endorsee, and acquires all the same rights, and is entitled to all the same remedies, as the holder had whom he paid, although no formal endorsement or transfer of the bill be made to him; and such payment *supra protest* does not, like a simple payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying, unless the party paying, by his own act, limits and narrows his right." It is clear, also, from the 159th section of the Code de Commerce, that the party paying the bill for honour is substituted for the holder. [COLTMAN, J. Who is the "porteur" in this case?] Rothschild. [CRESSWELL, J. The holder who claims under De Vos Ryland & Co. claims as their endorsee. The plaintiff, by paying the bill *supra protest*, takes his position, and is clothed with all his rights and subject to all his liabilities: and the duty of an endorsee under De Vos Ryland & Co. was to give notice to De Vos Ryland & Co.; and that is the true position

of these parties.] In Pothier, *Traité du Contrat de Change*, part 1, ch. 4, art. 5, § 114, the rule is thus laid down:—"Celui qui acquitte une lettre de change *pour l'honneur du tireur ou de quelqu'un des endosseurs, doit, pour obliger envers lui, *actione negotiorum gestorum*, celui pour l'honneur de qui il l'acquitte, la laisser protester par le porteur avant que de la payer. (a) La raison est, que le tireur et les endosseurs ne devenant débiteurs de la lettre que par le protêt qui en est fait, il faut qu'il ait été fait pour que celui qui l'a payée puisse prétendre les en avoir acquittés, et avoir, en conséquence, contre eux l'action *negotiorum gestorum*. L'étranger qui acquitte une lettre protestée, n'a pas seulement cette action *negotiorum gestorum* contre celui pour l'honneur de qui il l'a acceptée, l'ordonnance de 1673, (b) le subroge en toutes celles qu'avait le propriétaire de la lettre de change qu'il a payée, contre tous ceux qui en sont tenus. Cet article portet: 'Au moyen du paiement, il demeurera subrogé en tous les droits du porteur de la lettre, quoiqu'il n'en ait pas de transport, subrogation, ni ordre.' Il n'est donc pas besoin, pour cela, qu'en payant il en ait requis la subrogation. Pareillement, il n'est par nécessaire qu'après le protêt fait par le porteur de la lettre, l'étranger qui la lui paie fasse une nouveau protêt, qu'on appelle *protêt d'intervention*. Cet acte, quoiqu'il soit en usage, en ce cas, dans certaines provinces, est absolument inutile et superflu. Au reste, il doit intenter ces actions contre le tireur dans les mêmes délais dans lesquels le porteur, s'il n'eût pas été payée, aurait dû les intenter, selon la règle: *Qui alterius jure utitur, eodem jure uti debet*. Il doit même intenter dans les mêmes délais l'action *negotiorum gestorum* qu'il a de son chef; autrement, celui pour l'honneur de qui il apayé, *et cujus negotiorum gessit*, serait de pire condition que s'il ne *241] l'eût pas fait; ce que la nature du *quasi-contrat *negotiorum gestorum* ne permet pas." (c) And in Bell's Commentaries on the Law of Scotland, book 3, part 1, ch. 4, § 367, it is said, that, "In paying for

(a) Citing Elem. Jur. Camb. Hein. cap. 6, § 9, in not.

(b) Tit 5, art. 3.

(c) The party who pays a bill of exchange for the honour of the drawer or of an endorser, must, in order to subject the party for whose honour he pays it to an action *negotiorum gestorum*, cause it to be protested by the holder before he pays it. The reason is, that, as the drawer and the endorsers become debtors in respect of the bill, only by the protest, it is necessary that such protest should be made, to give to the party paying a right to say that he has discharged them, and thereby to acquire against them an action *negotiorum gestorum*. A stranger who pays a protested bill has not only this action *negotiorum gestorum* against the party for whose honour he pays, but the Ordonnance of 1673 clothes him with all those rights of action which the holder of a bill so paid had against all those who were liable upon it. By this article—by means of the payment, he shall be clothed with all the rights of the holder, without any assignment, subrogation, or endorsement. It is therefore unnecessary that the party, when he pays, should require any subrogation. It is equally unnecessary, that after the bill has been protested by the holder, the party paying it should cause a new protest, called a protest of intervention, to be made. Such a protest, though resorted to in certain districts, is perfectly useless and superfluous. It may be added, that the party so paying must take proceedings against the drawer within the same periods within which they must have been taken by the holder, if the bill had remained unpaid, according to the rule *qui alterius jure utitur, eodem jure uti debet*. He is also bound to commence within the same periods his own action *negotiorum gestorum*. If it were not so, the party for whose honour he paid the bill *et cujus negotium gessit*, would be in a worse condition than if the payment had not been made, which would be inconsistent with the nature of the quasi-contract *negotiorum gestorum*.

honour, the bill should be protested first. The person paying will have his remedy against him for whom he interposes, and against all on whom, had that person paid it, he would have had recourse." [CRESSWELL, J. The question is, what is meant by "all the rights" of the holder? As I understand the term, it means—all the rights which the person who pays the bill derives under him for whom he pays it—as endorsee of the party on whose account *he pays. If the present plaintiff is to be considered as the endorsee of De Vos Ryland & Co., he was bound to give them notice. In Bayley on Bills, (a) it is said that "the bail of any of the parties who are sued, or any persons who pay the bill or note on account of any of the parties, become, on payment, holders, and they hold as upon a transfer from the person for whom they made the payment, not as upon the transfer from the person they have paid."]

COLTMAN, J. (b) It appears to me that the doctrine laid down in the passage cited by my brother CRESSWELL from Bayley on Bills, is the true doctrine, and amply suffices for the decision of this case: "Any persons who pay the bill or note on account of any of the parties, become, on payment, holders; and they hold as upon a transfer from the person for whom they made the payment." Upon the authority of that dictum, which seems to me to be consistent with good sense, the present plaintiff, when he paid this bill, had a right to consider himself an endorsee under De Vos Ryland & Co., and, consequently, to give notice of the dishonour to them; and when a notice was given to the drawer, which was within time as far as De Vos Ryland & Co. were concerned, he had a right to adopt and to take advantage of it, as a notice given by himself. For these reasons, I am of opinion that the verdict was right.

CRESSWELL, J. The only question in this case is, whether or not the drawer received notice of dishonour in due time. Now, it is enough, if the holder gives due notice to the party from whom he receives the bill, and that party to the one from whom he takes it, and *so on. If, therefore, the plaintiff gave notice in due time to De Vos Ryland & Co., and De Vos Ryland & Co. gave due notice to the defendant, that would be sufficient; for it is perfectly consistent with the doctrine laid down by all the foreign writers, that the plaintiff, who paid the bill supra protest for the honour of De Vos Ryland & Co., should be considered as an endorsee or holder under those for whom he so paid it. Even bail, as appears from the passage cited from Bayley on Bills, have all the rights of holders against the person for whom they pay the bill, and all parties liable upon it to him. So, here, the plaintiff, who paid the bill for the honour of De Vos Ryland & Co., thereby acquired all the rights of an endorsee under them. And, if that be so, the notice to the defendant was in due time to entitle the plaintiff to sue him upon the bill.

(a) Page 148, 3d ed., but the authorities cited do not support the parties.

(b) Tindal, C. J., was absent.

ERLE, J. It seems to me also to be perfectly clear, that the notice of dishonour conveyed to the drawer in this case was sufficient. Payment for the honour of De Vos Ryland & Co. put the plaintiff in the situation of an endorsee under them, with all the rights and liabilities incident to that character. The plaintiff was not bound to put himself in that position: he had his election. I see nothing unreasonable or inconsistent in holding that Goodall might acquire a new title under the subsequent endorsement of the bill to him by De Vos Ryland and Co. But it is not necessary to found our judgment upon that point, inasmuch as we are all of opinion that the notice was good.(a)

Rule discharged.

(a) If Goodall acquired a new title by the endorsement, he might, if he had thought fit, have delayed his notice till the 9th of February; but, as he did, in fact, give notice on the day on which the bill was returned from Bruges, it was immaterial whether the notice was given by him in his own right as endorsee, or as the agent of De Vos Ryland & Co.

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*MAYLAM v. NORRIS. Jan. 27.

In assumpsit by A. against B., the declaration set out an agreement, under which B. was to be let into possession of a public-house, and to purchase certain fittings, &c. for 65*l.*, 4*l.* thereof to be paid immediately, and the residue on the 30th of July, on which day B. was to be let into possession; and, if either party made default or failed to fulfil the agreement, he was to forfeit 30*l.* to the other, *on demand*. Averment, that A. was always ready and willing, and offered to give possession, and to sell and deliver the fittings, &c. Breach, that, although B. paid the 4*l.*, yet he did not pay the plaintiff the 61*l.*, or any part thereof, or pay the plaintiff the 30*l.*, or any part thereof: Held, on special demurrer, assigning for cause that there had been no demand of the 30*l.*, that the breach was sufficient, notwithstanding the reference to the clause of forfeiture by the introduction of the words negating the payment of the 30*l.*

ASSUMPSIT. The declaration stated that the plaintiff, before and at the time of making the agreement and the promise of the defendant thereafter mentioned, was lawfully possessed of a certain dwelling-house, with the appurtenances, situate in the parish of St. Mary-le-bone, in the county of Middlesex, as tenant thereof to one W. K. Gaskell, for the term of one year from the 14th of October, 1843, and then carried on the trade of a seller of beer in and upon the said premises, and was then also possessed as aforesaid of certain fittings, fixtures, and utensils in trade, beer, stock in trade in and concerning his said trade as aforesaid, and other effects, then being in the said premises; and thereupon, on the 23d of July, 1844, by a certain agreement then made between the plaintiff of the one part, and the defendant of the other part, it was agreed by and between the plaintiff and the defendant, by and with the privity and consent of the said W. K. Gaskell, that the plaintiff should give up to the defendant, and let the defendant into, possession of the said premises, for the residue of the plaintiff's said term therein, and should sell the fittings, fixtures, and utensils in trade, named and contained in a certain inventory dated the day and year last aforesaid, and then produced and referred to by the

said plaintiff and defendant respectively (save and except all articles which had been *before then erased from the said inventory by [245 one Thomas Hine) for 65*l.*, to be paid as follows, 4*l.* as a deposit, in part thereof, to be paid at the time of signing the said agreement into the hands of the plaintiff, and the further sum of 61*l.* on the 30th of July then next ensuing, which day had elapsed before the commencement of the suit, together with the amount or value of the said beer and stock in trade at fair gauge, at which time, to wit, on the day and year last aforesaid, possession of the said premises, and fittings, fixtures, and utensils in trade, were to be given up to the defendant, and all rates, taxes, assessments, and other outgoings due and owing by the plaintiff for and in respect of such premises, including the costs and value of the repair of all damaged windows, were to be paid or allowed for up to the day and year last aforesaid, from which time the defendant was to commence, and be liable for the same; and the defendant thereby agreed to take the said premises, and to purchase all the effects above mentioned, for the consideration, and in manner, and upon the terms and conditions for and upon which the plaintiff had as aforesaid agreed to let and sell the same: provided, that, if either of the parties to the said agreement should make default, or fail to keep, fulfil, and observe the terms and conditions thereby agreed to be kept, fulfilled, and observed by them respectively, it was then, to wit, on the day and year first aforesaid, further mutually agreed between the plaintiff and defendant, that whichever of them should make such default, or fail to keep, fulfil, and observe the said agreement, should forfeit and pay to the other of them 30*l.* of lawful British money, *on demand*; to be recoverable in any of her majesty's courts of law. Mutual promises. Averment, that the plaintiff was always, from the time of making the agreement until and upon the said 30th of July, ready and willing, and then, to *wit, on the said 30th of July, offered to give [246 up to the defendant, and to let the defendant into, possession of the said dwelling-house, with the appurtenances, for the residue of the plaintiff's term therein, and to sell and deliver to the defendant the said fittings, fixtures, utensils in trade, beer, and stock in trade, so agreed to be sold as aforesaid, upon the terms aforesaid, and was then ready and willing, and then offered, fairly and duly to gauge, and to allow the defendant to gauge, the said beer and stock in trade, and also to allow, as part of the said 61*l.*, the amount of all rent, rates, taxes, assessments, and other outgoings, then due and owing by the plaintiff, for or in respect of the said premises, including the cost or value of the repair of all damaged external windows, and in every respect to complete and fulfil the said agreement on his the plaintiff's part to be fulfilled: Breach, that, although the defendant did pay the said deposit of 4*l.* at the time of signing the said agreement into the hands of the plaintiff, yet the defendant did not nor would, on the day and year last aforesaid, or at any other time, pay to the plaintiff the said 61*l.*, or any part thereof, or fulfil the

terms of the said agreement so to do, *or pay to the plaintiff the said 30l., or any part thereof*, although often thereunto requested, but had continually neglected and refused, and still did neglect and refuse, so to do, &c.

To this declaration the defendant demurred specially, assigning for causes, that it appeared by the declaration that the plaintiff sought to recover damages for the non-performance by the defendant of the agreement therein mentioned, and that it also appeared by the said declaration that it was expressly stipulated in the agreement that such damages should be payable *on demand*; whereas it did not appear by the declaration that *247] any *demand had been made, such demand being a condition precedent before any action could be brought for the recovery of the said damages.

Joinder in demurrer.

Byles, Serjt., (with whom was *Ogle*,) in support of the demurrer. It does not appear from the declaration, that the defendant was let into possession of the public-house which was the subject of the agreement. The action, therefore, is brought, not for the 61*l.*, the balance of the price of the fittings, &c., but for the 30*l.*, the amount agreed upon between the parties as liquidated damages for the breach of the agreement, which, by the express terms of the contract, is payable only *on demand*. This is a collateral sum, for which no action lies until an actual demand is made: “for, (a) the request is parcel of the contract, and must be proved; and no action arises until a request be made. The omission of an averment of a special request or notice, where by law they are necessary, is matter of substance, and may be taken advantage of on general demurrer; *Bach v. Owen*, 5 T. R. 409; and is not aided after verdict; *Rushton v. Aspinall*, 2 Dougl. 679; and the general averment of *licet sapius requisitus* will not be sufficient; *Wallis v. Scott*, 1 Stra. 88.” So, in *Carter v. Ring*, 3 Campb. 459, (a) Lord ELLENBOROUGH ruled, that, where to debt on bond conditioned for the payment of a sum of money *on demand*, the defendant pleads that no demand was made, upon which issue is joined, the plaintiff must prove an express demand before action brought. Again, in *Nicholl v. Bromley*, 2 Brod. & Bingh. 464, 5 J. B. Moore, 307, it was held, that, if the defeasance on a warrant of attorney state that it is given *248] to secure the *payment of a sum *on demand*, and, in case default shall be made, then judgment to be entered up and execution issue, an actual demand must be made; and that a proposal to settle amicably does not amount to such a demand. And in *Simpson v. Routh*, 2 B. & C. 682, 4 Dowl. & Ryl. 181, it was held, that, where an act of parliament provides for the payment of a sum of money on demand, no action can be sustained until a demand has been made. [EALE, J. The breach alleged in the declaration is, that the defendant did not pay the 61*l.*, *or fulfil the terms of the agreement so to do, or pay the 30l.*] There

(a) *Birks v. Trippet*, 1 Wms. Saund. sixth edit., 33 b, n. (2).

(b) And see *Osbourn v. Hosier*, 6 Mod. 167; Lord Holt, 194.

re two breaches. As to the former breach, the defendant is at all events entitled to judgment, as the declaration does not show that any portion of the 61*l.* is due.

Channell, Serjt., contrò. The declaration is good. It sets out an agreement under which the plaintiff contracted to sell to the defendant certain fittings, fixtures, and utensils in trade for 65*l.*, of which 65*l.* the sum of 4*l.* was paid at the time of signing the agreement, and the residue was to be paid on a day that had passed; and it avers that the plaintiff was ready and willing to deliver the said fittings, &c., to the defendant, and to make certain allowances mentioned in the agreement. The money was to be paid, not on demand, but on the performance by the plaintiff of a condition precedent, which the declaration avers that he was ready and willing and offered to perform. The declaration therefore shows a good cause of action in respect of the 61*l.* The penalty stands upon a totally different footing. [MAULE, J. You contend that the plaintiff has declared, not for the 30*l.*, but for damages for the non-payment of the 61*l.*] Precisely so. In Williams's Saunders, 6th edit. vol. i., p. 58 b, n. (d), it is said: "Where the penalty is *con- [*249 tained in any other instrument than a bond, damages may be recovered beyond it; *Winter v. Trimmer*, 1 W. Blac. 395; *Harrison v. Wright*, 13 East, 343; for, the plaintiff has his option to sue either for the penalty or for the breach of contract. If he sue for the penalty in an action of *debt*, the case is within the statute 8 & 9 W. 3, and its provisions must be complied with; but, if he sue either in covenant or assumpsit, according as the writing which contains the penalty is under seal or not, he proceeds for damages; and it is immaterial whether he claims the penalty or not, for the jury are not bound to give that sum, but may give more or less, as they think fit."(a) *Harrison v. Wright* was an action of assumpsit upon a memorandum of charter describing the agreement of the defendant, the ship-owner, to proceed with all convenient speed to a foreign port, and there load, within twenty running days, a cargo from the plaintiff's factors, and therewith return home, and in fifteen running days deliver the same, on payment of certain freight, concluding with a certain *penalty for non-performance*; and it was held that the plaintiff might recover damages on the breach of the contract in the defendant's not permitting the vessel to proceed on the voyage, beyond the amount of the penalty. Here, there is a perfectly good breach in the non-payment of the 61*l.* on the 30th of July; and the allowance in respect of the rent, rates, taxes, &c., clearly was not a condition precedent to the plaintiff's right to recover that sum.

Byles, Serjt., in reply. Upon this declaration the 61*l.* were never due. If the allegation as to the 30*l.* was *struck out, the declaration [*250 clearly would be insufficient. The agreement is strictly an agree-

(a) The obligee of a bond may sue in covenant for the penalty; and, *quære*, whether he may not sue in covenant for the sum due by the condition. See Cases in Chan. 294.

ment of purchase. The payment of the 61*l.* and the giving possession of the public-house were to be contemporaneous acts. [ERLE, J. Possession of the fittings, &c., was not to be given until 65*l.* had been paid: but, notwithstanding that, I apprehend the property in them passed to the defendant by the contract.] Suppose the property did pass, the question is, does it appear, upon this declaration, that the 61*l.* ever became payable? There are, at all events, two separate and distinct breaches, the one for non-payment of the 61*l.*, the other for non-payment of the 30*l.* [CRESSWELL, J. I entertain great doubt whether that is so. The object of negating the payment of the 30*l.* was, to rebut any inference that the defendant had satisfied the terms of the contract by payment of that sum.] Taking the whole together, the plaintiff has agreed to set his damages at 30*l.* [CRESSWELL, J. That is for the jury.]

TINDAL, C. J. If it could be shown that the action is brought in respect of the 30*l.* penalty only, no doubt the objection would, on the authority of *Birks v. Trippet*, be valid, inasmuch as no demand of that sum is averred in the declaration. The introduction, however, of a penalty does not preclude the plaintiff from suing for the non-performance of the agreement as to the 61*l.* The declaration sets out the agreement, and avers the plaintiff's readiness and willingness, and an offer on his part, to perform the agreement; and then it alleges for breach, that, although the defendant paid the deposit of 4*l.*, yet he did not nor would pay the plaintiff 61*l.*, or any part thereof, or fulfil the terms of the said agreement so to do. That is a perfectly good breach; and when the *251] plaintiff goes on to negative the *payment of the 30*l.*, it is merely for the purpose of excluding the supposition that the breach has been satisfied by his acceptance of the stipulated penalty.

The rest of the court concurred.

Judgment for the plaintiff.

JOHNSTON and Others v. FRANK NICHOLLS. Jan. 27.

B. gave to A. the following guarantee: "As you are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you, the payment of any sums of money which C. now is, or may at any time be, indebted to you, so that I am not called upon to pay more than the sum of 2000*l.*" There had been considerable dealings between A. and C. prior to the date of the guarantee, consisting of loans of money, payments made for, and goods supplied to C. by A., the credit upon which had not then expired, and those dealings had been to a small extent since continued: Held, that the guarantee disclosed a sufficient consideration, for the payment as well of the past as of the future debt.

The declaration alleged the existence of prior dealings between A. and C., of the three descriptions above mentioned, and then went on to state, that, in consideration that A. would continue such dealings as aforesaid with C., B. promised A. to be responsible for and to guarantee the payment of any sums of money which C. then was or at any time thereafter might be indebted to A. in the course of such dealings as aforesaid; that is to say, as well in respect of the said sums of money so lent and advanced on credit as aforesaid, and of the said sums of money so paid, laid out, and expended on credit as aforesaid, and of the said goods so sold on credit as aforesaid, and which respective credits were wholly unexpired as aforesaid at the time

*of the making of the said promise, as also in respect of such dealings so to be continued as aforesaid, so that C. should not be called on to pay more than 2000*l.*: Held, that there was no variance between the declaration and the proof; and that the declaration was good.*

ASSUMPSIT, upon a guarantee. The declaration stated, that, before and at the time of the making of the promise of the defendant, the plaintiffs had been and were merchants using the style and firm of Nathaniel Johnston & Sons, and, as such merchants, had, in the way of their trade and business, had dealings with a certain other firm using the name, style, and firm *of Claridge, Brothers, & Nicholls, in and about the [252 lending and advancing on credit to the said firm of Claridge, Brothers, & Nicholls, certain sums of money in the way of their said trade and business, and in and about the paying, laying out, and expending on credit for the same firm of certain other sums of money in the way of their said trade and business, and in and about the selling and delivering on credit to the same firm of certain goods in the way of their said trade and business; that the plaintiffs had, in the course of the said dealings, lent and advanced on credit to the same firm, at the request of the same firm, divers sums of money, amounting in the whole to a large sum of money, to wit, 194*l.* 2*s.* 10*d.*, and had also, in the course of the said dealings, paid, laid out, and expended on credit for the same firm, at the request of the same firm, divers other sums of money, amounting to a large sum of money, to wit, 92*l.* 13*s.* 9*d.*, and had also in the course of the said dealings sold and delivered on credit to the same firm, at the request of the same firm, certain goods at and for certain prices, amounting in the whole to a large sum of money, to wit, 3079*l.* 6*s.*, which respective credits were wholly unexpired, and which three last-mentioned several sums, amounting in the whole to a large sum, to wit, 3366*l.* 6*s.* 9*d.*, were wholly unpaid at the time of the making of the said promise—of all which the defendant, at the time of the making of his said promise, had notice; that thereupon, whilst the said respective credits were so unexpired, and the said three several sums, amounting to the said large sum of money as aforesaid, to wit, 3366*l.* 2*s.* 7*d.*, were so unpaid as aforesaid, to wit, on the 1st of June, 1843, in consideration that the plaintiffs would continue such dealings as aforesaid with the said firm of Claridge, Brothers, & Nicholls, he the defendant promised the plaintiffs to be responsible to the *plaintiffs for, and to guarantee to the [253 plaintiffs, the payment of any sums of money which the said firm of Claridge, Brothers, & Nicholls,—whether it might consist of the same members as at the present time, to wit, the said Francis Claridge, George Claridge, and John Nicholls, or others,—then were or at any time thereafter might be indebted to the plaintiffs in the course of such dealings as aforesaid, that is to say, as well in respect of the sums of money so lent and advanced on credit, and of the sums of money so paid, laid out, and expended on credit, and of the goods so sold and delivered on credit, and which respective credits were wholly unexpired at the time of the

making of the said promise, as also in respect of such dealings so to be continued, so that the defendant should not be called on to pay more than 2000*l.* Averment, that the plaintiffs, confiding in the said promise, did afterwards continue such dealings as aforesaid with the said firm of Claridge, Brothers, & Nicholls, to wit, from the time of the making of the said promise hitherto, and did afterwards, in the course of such dealings so continued as aforesaid, pay, lay out, and expend for the said firm of Claridge, Brothers, & Nicholls, on certain credit then agreed upon between the plaintiffs and the said firm of Claridge, Brothers, & Nicholls, to wit, such credit as was so given before the making of the said promise in respect of moneys so paid, laid out, and expended as first aforesaid, certain sums of money, amounting in the whole to a large sum of money, to wit, 700*l.* 10*s.* 2*d.*, which the said firm of Claridge, Brothers, & Nicholls from time to time had occasion for, and required of the plaintiffs, in the way of their said trade and business; that the plaintiffs did also, after the making of the said promise, and before the commencement of the suit, in the course of such dealings so continued as aforesaid, sell and deliver to the said firm of Claridge, Brothers, & Nicholls, on certain credit then agreed upon between the plaintiffs and the said firm of Claridge, Brothers, & Nicholls, to wit, such credit as was so given as aforesaid before the making of the said promise in respect of goods so sold and delivered as first aforesaid, certain other goods of great value, which they the said firm of Claridge, Brothers, & Nicholls from time to time had occasion for and required of the plaintiffs in the way of their said trade and business, and at and for certain reasonable prices amounting in the whole to a large sum of money, to wit, 26*l.*; and, although the said credit and time for payment of part of the said moneys so paid, laid out, and expended as aforesaid by the plaintiffs for the said firm of Claridge, Brothers, & Nicholls, after the making of the said promise, amounting to a certain large sum, to wit, 242*l.* 5*s.* 1*d.*, had elapsed; and although the said credit and time for payment of the price of part of the said goods so sold and delivered as aforesaid by the plaintiffs to the said firm of Claridge, Brothers, & Nicholls, before the making of the said promise, amounting to a certain other large sum, to wit, 1135*l.* 3*s.* 3*d.*, had also elapsed; which two last-mentioned sums of 242*l.* 5*s.* 1*d.* and 1135*l.* 3*s.* 3*d.*, amounted together to a much less sum than the said sum of 2000*l.*, to wit, to 1377*l.* 8*s.* 4*d.*; yet the said firm of Claridge, Brothers, & Nicholls had not, although they were afterwards, to wit, on the 1st of August, 1843, requested so to do, as yet paid to the plaintiffs the last-mentioned part of the said moneys so paid, laid out, and expended as aforesaid, after the making of the said promise, or any part thereof, or the said price of the last-mentioned part of the goods so sold and delivered as aforesaid before the making of the said promise, or any part thereof, but had wholly neglected and refused so to do; of all which premises the defendant

afterwards, to wit, on the day and year last aforesaid, had notice; yet the defendant had not as yet accounted to the plaintiffs, or paid to the plaintiffs, the last-mentioned part of the said moneys so paid, laid out, and expended as aforesaid after the making of the said promise, or any part thereof, or the said price of the last-mentioned part of the goods so sold and delivered as aforesaid before the making of the said promise, or any part thereof, although he the defendant was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiffs so to do, and had wholly neglected and refused, and still wholly neglected and refused, so to do, and the last-mentioned part of the said moneys so paid, laid out, and expended as aforesaid after the making of the said promise, and the said price of the last-mentioned part of the goods so sold and delivered as aforesaid before the making of the said promise, still remained wholly due and unpaid to the plaintiffs. [*255]

The declaration also contained a count upon an account stated.

The defendant pleaded, first, non assumpsit; secondly, to the first count, that the several credits in that count mentioned were not, nor was any of them, at the time of the making of the promise therein alleged, unexpired, in manner and form as therein alleged, but, on the contrary thereof, had, and each and every of them had respectively, before then expired; thirdly, to the first count, that the plaintiffs did not, after the making of the said promise, continue such dealings as aforesaid, or any dealings whatever, with the said firm of Claridge, Brothers, & Nicholls, in manner and form as therein alleged. There was also a plea of fraud and covin, which, however, was abandoned at the trial.

The cause was tried before CRESSWELL, J., at the adjourned sittings in London, after Trinity Term last.

The facts that appeared in evidence were as follow:—The plaintiffs were wine importers, trading under the firm of Nathaniel Johnston & Sons, at Bordeaux, Paris, and London. The defendant was the father of Mr. John Nicholls, of the firm of Claridge, Brothers, & Nicholls in the declaration mentioned, who carried on business as wine-merchants in Pudding Lane, London. The plaintiffs, who had had dealings with Claridge, Brothers, & Nicholls, from the month of November, 1840, on the 4th of April, 1842, addressed the following letter to the defendant, then at Toulouse:— [*256]

“Sir,—Having permission from your son, Mr. John Nicholls, to address you, we take the liberty of troubling you with a few lines, being about to enter into a transaction with the highly respectable and very rising firm of Messrs. Claridge, Brothers, & Nicholls, which house has every prospect of commanding that position in the wine-market that the character of the young men engaged in it deserves. Before terminating the proposed transaction, which is of considerable amount, it would be satisfactory to us to hear from you yourself that it is your intention to assist your

son to such an extent as to justify Messrs. Claridge, Brothers, & Nicholls entering into an engagement requiring additional capital.

(Signed) "NATHANIEL JOHNSTON & Sons."

On the 9th of April, the defendant addressed to the plaintiffs the following letter in reply :—

"Gentlemen,—I felt highly gratified by the kind terms in which you express yourselves of my son and his partners, in your note of the 4th of April. I am persuaded they will always be solicitous to merit the esteem and confidence of your eminently respectable house. As soon as I arrive in London, (which will be in the course of next June,) I shall enter into arrangements for assisting the firm of Claridge & Co. as far as my means will enable me.

(Signed) FRANK NICHOLLS."

On the 23d of April, 1842, the plaintiffs sold to Claridge, Brothers, & Nicholls sixty-seven hogsheads *of claret at a credit of fifteen
 *257] months : upon this transaction there was due to the plaintiffs at the time of bringing the action a balance of 1135*l.* 3*s.* 3*d.* On the 18th of May, 1843, Mr. Judd, one of the plaintiffs, wrote to the defendant as follows :—

"My dear sir,—I had the pleasure of writing to you last year at Toulouse, and now take the liberty of again doing so, feeling sure that you now have as much interest in the well-being of that respectable firm, Messrs. Claridge, Brothers & Co., as at that period. Under these circumstances I venture to address you, as I wish to avoid having to reproach myself hereafter for not acting as I consider it is my duty both as regards them and my partners. The nature of their business requires a larger capital than they now have to carry it on with advantage to themselves ; and I am convinced you will agree with me, that it is the height of imprudence for a house being obliged, in order to attain the position it is seeking, to trade considerably beyond its capital, which I consider to be the case with the firm in question.

"Referring to your note of the 9th of April, 1842, in which you state your willingness to promote their prospects in the best way you can, I am induced to write to you to ask you if you have any objection to become security for them to the extent of 1500*l.* or 2000*l.*, as I am willing to assist them with money and credit in addition to the large account now open between us : but, as the vicissitudes in business are great, I feel bound to make this request, in consideration of my partners, though I beg you to understand most distinctly that my confidence in them is unshaken. Your son and his friends are unconscious of my having written to you ; therefore you are at liberty to make the contents of this letter known to them, or not, as you may deem fit.

(Signed) "J. P. JUDD."

*258] *To this letter the defendant, on the 23d of May, sent the following reply :—

“My dear sir,—I have to apologize for delaying to answer your letter of the 18th; but I thought it right to avail myself of your permission to communicate the contents to my son, who also wished to consult his partners. They agree in thinking that it is unnecessary for me to enter into any security at present. I still adhere to my declaration in the letter you allude to, viz. that it is my determination to support the firm to the utmost of my power, having, as you justly remark, as much interest in their well being as ever.
(Signed) FRANK NICHOLLS.”

The plaintiffs having declined to give further credit to Claridge, Brothers, & Nicholls, without security, the defendant, on the 30th of May, 1843, wrote to Mr. Judd as follows:—

“My dear sir,—Having communicated with my son and his partners, I beg to inform you that I have no objection to become security for the firm of Claridge, Brothers, & Nicholls, to the amount of 2000*l*.
(Signed) FRANK NICHOLLS.”

On the same 30th of May, the plaintiffs sold to Claridge, Brothers, & Nicholls, another parcel of wines, to the amount of 718*l*., at a credit of twenty-seven months: but, finding that the defendant's letter of that date did not amount to an absolute guarantee, Mr. Judd, on the 1st of June, wrote to him as follows:—

“My dear sir,—I am in receipt of your esteemed favour of the 30th ult., in which you state you have no objection to become security for the firm of Claridge, Brothers, & Nicholls to the amount of 2000*l*. Now, as the wording of this would render your kind intentions [259
*totally unavailable, I take the liberty of sending you a *pro forma* letter, which I feel sure you will not object to address to Nathaniel Johnston & Sons.
(Signed) J. P. JUDD.”

Upon receipt of this letter, the defendant copied the guarantee which was enclosed in it, and returned it signed and addressed as requested. The guarantee was as follows:—

“June 1st, 1843.

“To Messrs. Nathaniel Johnston & Sons, 6 Mark Lane:

“Gentlemen,—As you are about to enter upon transactions in business with Messrs. Claridge, Brothers, & Nicholls, with whom you have already had dealings, in the course of which they may from time to time become largely indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you the payment of, any sums of money which that firm—whether it may consist of the same members as at present or others—now is or may at any time be indebted to you, so that I am not called upon to pay more than the sum of 2000*l*.
(Signed) FRANK NICHOLLS.”

Claridge, Brothers, & Nicholls, before the date of the guarantee, besides the debt due from them to the plaintiffs for wines, were largely

indebted to them for cash advanced, and for payments made on their account for duties. The only sales of wine made to them subsequently to the date of the guarantee were, one of 14*l.* on the 14th of August, and one of 12*l.* on the 1st of September, 1843. But Claridge, Brothers, & Nicholls, had not asked for further credit since the date of the guarantee.

*260] *On the part of the defendant it was insisted, that there was no consideration for the defendant's undertaking apparent on the face of the instrument declared on, so far as concerned the antecedent debt, and that there was a variance between the guarantee and the declaration, the latter being applicable only to future dealings between the plaintiffs and the firm of Claridge, Brothers, & Nicholls, and the former speaking of new dealings, and also the continuance of the old ones. It was also objected that there had been no such continuance of the dealings as contemplated by the guarantee, and consequently that the condition upon which alone the defendant's liability was to attach, had not been performed.

This latter point was submitted to the jury, who returned a verdict for the plaintiffs, damages 1377*l.* 8*s.* 4*d.*; and leave was reserved to the defendant to move to enter a nonsuit on the grounds urged.

Channell, Serjt., (with whom was Ogle,) in Michaelmas term last obtained a rule nisi accordingly, and also in arrest of judgment;—MAULE, J., suggesting that the point, if there were any foundation for it, was upon the record. The cases of *Wood v. Benson*, 2 Cr. & J. 94, and *Raikes v. Todd*, 1 P. & D. 138, 8 Ad. & E. 846, were cited.

Shee, Serjt., (with whom was *Pearson*,) now showed cause. There is no pretence for this motion. The declaration describes a course of dealing between the plaintiffs and Claridge, Brothers, & Nicholls; and goes on to allege, that, in consideration that the plaintiffs would continue such dealings, the defendant promised to be answerable for any debt then due, or which thereafter might become due, to the plaintiffs from Claridge, *261] *Brothers, & Nicholls. It is to be contended on the part of the defendant that the guarantee contemplated, not the continuance of the prior course of dealing, but the entering into new transactions. The real meaning of the contract, however, was, that, in consideration that the plaintiffs would continue the old course of dealing by entering into new transactions *ejusdem generis*, the defendant promised to pay any debt contracted by the firm in the course of such dealings. [CRESSWELL, J. Suppose the plaintiffs had abandoned the wine trade, and entered into some other—the tobacco trade, for instance—would the guarantee have applied to dealings with them in such new trade?] Probably not: the subsequent dealings must be dealings of the same description as the old ones. In *Wood v. Benson*, 2 Cr. & J. 94, the guarantee was in these words: "I engage to pay the directors of the Manchester

Gas Works, or their collector, for all the gas which may be consumed in the minor theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. N. ; and I do also engage to pay for all arrears which may be now due :” and it was held, that the agreement was void as to the arrears, the consideration for the promise to pay the bygone debt not being sufficiently apparent on the face of the agreement, but that the defendant was liable for the amount of the gas subsequently supplied, under a count for goods sold and delivered. [ERLE, J. There is no necessity for citing authorities to show that the consideration may be *past* (a) as well as *future* advances. MAULE, J. The dealings here are sufficiently defined as to their nature and quality : but the objection is, the want of a precise definition of quantity : and the question is, whether the contract provides that future credit shall be given “to any amount at all.” The case of *Russell v. Moseley*, 3 Bro. [*262 & Bingh. 211, 6 J. B. Moore, 521, was open to the same remark ; there, the guarantee was as follows : “I hereby guarantee the present account of H. N. due to R. T. S., of 112*l.* 11*s.* 4*d.*, and what she may contract from this date to the 30th of September next :” and it was held that the consideration was sufficiently disclosed. In *Kennaway v. Trelewan*, 5 M. & W. 498, a guarantee was given in the following terms : “I hereby guarantee to you the sum of 250*l.* in case Mr. P. should make default in the capacity of agent and traveller to you ;” and it was held that the consideration sufficiently appeared on the face of the instrument. [MAULE, J. There the guarantee had reference to the future employment of the agent.] That is not the necessary or the natural meaning of the instrument. PARKE, B., there observed : “It is said, and truly, that, in the present case, there was no binding contract on the plaintiffs, and that, notwithstanding the guarantee, they were not bound to employ Paddon. But a great number of the cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed (b) rests with one of the contracting parties. A guarantee falls under that class ; when a person says, ‘In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time and neglect to pay over to you,’ the party indemnified is not therefore bound to employ the person designated by the guarantee ; but if he do employ him, then the guarantee attaches and becomes binding on the party who gave it. It is therefore no objection, in the present case, to say, that the plaintiffs were not obliged to take Paddon into their service ; they might do so or not, as they pleased ; but, *having once done so, the guarantee attaches, and the defendant becomes responsible for the default.” In *Raikes v. Todd*, 1 P. & [*263 D. 138, 8 Ad. & E. 846, the consideration for guarantying past advances

(a) But, to make past advances to A. a consideration for a promise by B., such advances must have been made at the request of B.

(b) i. e. the only act which there is a binding engagement to perform.

was not apparent on the face of the instrument. Here, the continuance of the dealings was ample consideration; and the jury have expressly found that the dealings were *bonâ fide* continued. At all events, assuming that there was a variance, it was one that was amendable. The counsel for the defendant admitted at the trial that it was so. [CRESSWELL, J. You did not ask to be allowed to amend, and therefore the court cannot help you.] The learned judge was not distinctly asked to reserve to the plaintiffs leave to amend, merely because the point was not pressed against him. [MAULE, J. The defendant's counsel seems to have assented that the variance, if any, was amendable; and no more was said. I should infer that the objection had been given up.] The declaration well describes the contract; and there is no ground for arresting the judgment.

Channell, Serjt., in support of the rule. If upon the face of the contract as proved there be no sufficient consideration, the defendant is entitled to a nonsuit, or to a verdict on non assumpsit. [MAULE, J. Suppose a declaration states a promise, without consideration, to pay the debt of a third person, and the defendant pleads non assumpsit only, would not the plaintiff, on proof of such a promise as alleged in the declaration, be entitled to succeed on that issue?] Since the new rules it has been held, that the statute of frauds need not be specially pleaded, but may be given in evidence under non assumpsit.^(a) To satisfy the *264] statute, there must be a memorandum in writing showing a consideration as well as a promise; *Wain v. Warlters*, 5 East, 10, 1 J. P. Smith, 299; *Saunders v. Wakefield*, 4 B. & Ald. 595. The defendant is entitled to contend that the plaintiff has failed to prove the issue on non assumpsit unless he shows that the promise was made on a good consideration. The guarantee here is given in respect of a by-gone debt, and of a liability to arise out of future dealings: but the character and extent of those dealings are wholly undefined. Undoubtedly, it is not necessary that the consideration for the defendant's promise should be stated in distinct terms on the face of the guarantee: it is enough if it appears by necessary implication. All the cases to be found in the books, are cases where the liability of the party was to arise out of future transactions. Such were the cases of *Stadt v. Lill*, 9 East, 348; *Kennaway v. Treleavan*, 5 M. & W. 498; *Jarvis v. Wilkins*, 7 M. & W. 410; *Newbeury v. Armstrong*, 6 Bingh. 201, 3 M. & P. 509. In the last-cited case the guarantee was as follows:—"I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ, to the amount of 50*l.*;" and it was held that the consideration sufficiently appeared. TINDAL, C. J., there said: "The words are all prospective. It may fairly be implied that Corcoran had left one service, and that the guarantee was given in consideration of his being taken into another." In *Hawes v. Armstrong*, 1 New Cases, 761, 1 Scott,

(a) See *Raikes v. Todd*, 1 P. & D. 138, 8 Ad. & E. 846. Vide tamen 6 M. & G. 54 (b).

661, it was held that no consideration was to be implied from an undertaking as follows:—"Enclosed I forward you the bills drawn per J. T. A. upon and accepted by L. D., which I doubt not will meet due honour; but, in default thereof, I will see the same paid." In *delivering [265 the judgment of the court, TINDAL, C. J., uses language that is peculiarly applicable to this case. He says: "The consideration is thus stated in the declaration in the present case—that the plaintiffs, at the request of the defendant, would give time for the payment of the debt of 260*l.* then due from J. T. Armstrong & Dell, and would take, accept, and receive by way of security for the payment of the same the several bills of exchange set out in the declaration, and would forbear and give time to the said J. T. Armstrong & Dell, for payment of the said debt or sum of 260*l.*, until the said bills should respectively become due and payable;" and whether this consideration sufficiently appears in the written memorandum, is the point in dispute. That such consideration does not appear expressly and in terms, in such memorandum, is apparent on the bare inspection of the writing itself. It is not, however, necessary that such consideration should appear in *express terms*: it would undoubtedly be sufficient in any case if the memorandum were so framed, that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute: but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise. Now, looking at the memorandum in this case, and reading it as persons of ordinary understanding would read it, we cannot come to the conclusion that giving time and forbearance to sue was *necessarily* the consideration for the promise of the defendant. It may have been so, *undoubt- [266 edly; and most probably it was; but the consideration may also have been, for any thing to the contrary to be collected from the written agreement, an engagement on the part of the plaintiffs to extend their credit to Armstrong & Dell; or an engagement by the plaintiffs to discount these bills for Armstrong & Dell; for there is nothing whatever in the letter itself that necessarily connects the undertaking of the defendant with the consideration of forbearance; no expression to denote that the bills are delivered in satisfaction of or as a security for the debt then due from Armstrong & Dell to the plaintiffs; not even any mention that any debt was due to him. Undoubtedly, it is extremely probable, from the amount of the debt due from Armstrong & Dell agreeing exactly with the amount of the bills enclosed in the letter, that such bills were sent as a security for the debt then due, and if so, that the forbearance for the time

the bills had to run must have formed the ground for the promise of the defendant; but there is no *written evidence* to show that such was the case; and, after proof of the existence of such debt by parol evidence, (which might be admitted,) the great link in the chain of the evidence would still be wanting, and there would be nothing but parol evidence to supply it, viz., that the forbearance of suing for that debt was the consideration for the particular promise." There is another class of cases pointing both to past and future liability. To this class belong *Russell v. Moseley*, 3 Bro. & Bingh. 211, 6 J. B. Moore, 521, and *Wood v. Benson*, 2 Cr. & J. 94. In the latter the guarantee was held bad so far as it related to the by-gone supply; and it was only upon the count for goods sold and delivered that the plaintiff was held entitled to recover; thus

*267] treating the defendant as primarily liable in respect of the "subsequent supply. *Raikes v. Todd*, 1 P. & D. 138, 8 Ad. & E. 846, is an authority for the defendant. [CRESSWELL, J. That case went upon a different ground. I should rather infer that the past debt might be a good consideration, provided it distinctly appeared on the face of the instrument to be the consideration intended. In the uncertainty of consideration the plaintiff cannot recover.] Lord DENMAN in that case says: "There is certainly no necessity that the consideration should be co-extensive with the promise; but the real consideration, whatever it is, must be set out on the record. I entirely agree in the rule of construction recently laid down by TINDAL, C. J.,^(a) and my brother PATTESON;^(b) and, on reading this guarantee with reference to that rule, I must confess myself unable to say what it was that induced the defendant to guarantee payment of the past advances. I should form a conjecture that both forbearance to sue for the past debt, and the making of further advances, constituted the consideration. That, however, is conjecture only; and the declaration alleges a different consideration, namely, the further advances only. I think, therefore, the real consideration is not set out in the declaration, and the great uncertainty in which it is left entitles the defendant to have the rule made absolute." Supposing the consideration here sufficient to cover the by-gone transactions, it is clear that the plaintiffs, by giving credit to Claridge, Brothers, & Nicholls, for a very small amount of money or goods, would have so far performed the condition as to let in their right under this guarantee to call upon the defendant to pay the whole debt previously existing. [MAULE, J. Provided the subsequent dealings were of the particular class spoken of.] Upon *the
*268] whole, it is submitted that there is a clear variance between the guarantee and the statement of it in the declaration, inasmuch as the declaration makes the guarantee relate to a continuance of the prior and particular dealings; and there is a positive allegation that there had been dealings of the three descriptions mentioned, resulting in a debt.

(a) *Hawes v. Armstrong*, 1 New Cases, 761, 1 Scott, 661.

(b) *James v. Williams*, 5 B. & Ad. 1109.

not then payable; thus giving to the guarantee a consideration different from that which is its true construction.

MAULE, J.(a) This is a rule calling upon the plaintiffs to show cause why the judgment should not be arrested, or why the verdict found for them at the trial should not be set aside, and a nonsuit entered.

The judgment is sought to be arrested on the ground that the declaration discloses no sufficient consideration for the defendant's promise. Now, the consideration and the promise are thus stated—after an allegation of certain dealings which the plaintiffs had had with the firm of Claridge, Brothers, & Nicholls—"in consideration that the plaintiffs would continue such dealings as aforesaid with the said firm of Claridge, Brothers, & Nicholls, he, the defendant, promised the plaintiffs to be responsible to the plaintiffs for, and to guarantee to the plaintiffs the payment of, any sums of money which the said firm of Claridge, Brothers, & Nicholls, then were or at any time thereafter might be indebted to the plaintiffs in the course of such dealings as aforesaid." That amounts in substance to this,—that, in consideration that the plaintiffs would do something *in futuro*, the defendant promised in like manner to do something *in futuro*. I think the declaration discloses a sufficient consideration for the promise, and that the case stands clear of the objection that has been urged in arrest of judgment.

*Then, as to the alleged variance. This action is founded [269 upon a mercantile contract, which refers to a state of circumstances existing at the time between the plaintiffs and Claridge, Brothers, & Nicholls, and must therefore be construed with reference to the existing circumstances of the parties between whom and on whose account it is made. Mercantile contracts like these are more peculiarly susceptible of explanation by such references. The declaration alleges the existence of prior dealings, of three descriptions, between the plaintiffs and the firm of Claridge, Brothers, & Nicholls, viz., loans of money to them, payments of money on their account, and sales of goods to them on credits not expired at the time of the contract. It then goes on to state, that "in consideration that the plaintiffs would continue such dealings as aforesaid with the said firm of Claridge, Brothers, & Nicholls, he, the defendant, promised the plaintiffs to be responsible to the plaintiffs for, and to guarantee to the plaintiffs the payment of, any sums of money in which the said firm of Claridge, Brothers, & Nicholls, then were, or at any time thereafter might be, indebted to the plaintiffs in the course of such dealings as aforesaid; that is to say, as well in respect of the said sums of money so lent and advanced on credit as aforesaid, and of the said sums of money so paid, laid out, and expended on credit as aforesaid, and of the said goods so sold and delivered on credit as aforesaid, and which respective credits were wholly unexpired as aforesaid at the time of the making of the said promise of the defendant, as also in respect

(a) Tindal, C. J., was absent.

of such dealings so to be continued as aforesaid, so that the defendant should not be called on to pay more than the sum of 2000*l*." The declaration then avers a continuance of such dealings, and a debt resulting to the plaintiffs. The defendant has pleaded non assumpsit, which admits the preliminary matters alleged in the declaration. Now,
 *270] the letter which was given in evidence to support this declaration is as follows:—"As you (the plaintiffs) are about to enter upon transactions in business with Messrs. Claridge, Brothers, & Nicholls, with whom you have already had dealings, in the course of which they may, from time to time, become largely indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you, the payments of any sums of money which that firm now is or may at any time be indebted to you, so that I am not called upon to pay more than the sum of 2000*l*." Taking that in connection with the admitted fact that the plaintiffs had already had prior transactions in business with the firm alluded to, upon which a large debt was then in course of becoming due from them, I should understand the guarantee to contemplate a continuance of dealings such as had already taken place; and, if so, the allegation in the declaration and the instrument produced in support of it are identical, and there is consequently no foundation for this branch of the rule. Taking this view of the case, I think it unnecessary to inquire how far the somewhat subtle argument of my brother *Channell* may be well founded.

CRESSWELL, J. I am also of opinion that this rule must be discharged.

It has been contended that the defendant is entitled to a nonsuit, or to have a verdict entered for him on the issue upon non assumpsit, on two grounds; first, that there was no binding promise on the part of the defendant; secondly, that, at all events, he did not promise in the manner alleged in the declaration: in short, that there is a fatal variance between the allegation and the proof.

Is this a binding guarantee? It refers to prior dealings which had
 *271] taken place between the plaintiffs and Claridge, Brothers, & Nicholls, and speaks of their being about to enter upon further transactions with the latter. It is fair to assume, therefore, that this means transactions of the same character as those already had. The guarantee then goes on to suggest, that, in the course of such dealings, the firm alluded to may become largely indebted to the plaintiffs: and, in consideration of the plaintiffs entering upon transactions in business with Claridge, Brothers, & Nicholls, that is, continuing to have dealings with them as they had theretofore had, the defendant agrees to be responsible to the plaintiffs for the payment of any sums of money in which the firm then was or at any time thereafter might become, indebted to them not exceeding 2000*l*. That discloses a sufficient consideration for the defendant's promise; it is not necessary that the consideration should correspond in value with the undertaking of the defendant.

Then is there any variance? The declaration is a mere expansion or explanation of the contract. If I am right in assuming that the future dealings to which the guarantee points, mean dealings of the same character as those which the parties had already had, the question is free from difficulty. The declaration, after stating the nature of the prior dealings, and setting out the guarantee, alleges that the plaintiffs, confiding in the defendant's promise, did continue such dealings as aforesaid with the said firm of Claridge, Brothers, & Co.; and there is a plea that the plaintiffs did not continue such dealings as aforesaid with the firm. Upon the evidence it appeared that there had been subsequent transactions between the plaintiffs and Claridge, Brothers, & Nicholls, of the same character and description as those which had taken place between them prior to the making of the guarantee: a large sum of money was paid by the plaintiffs for duties, and goods were supplied to the firm, such as they required, and all that they asked for. I therefore [*272 think that there was a legal and binding promise, and one that supported the declaration. I also agree with my brother MAULE that there is no ground for arresting the judgment.

EALE, J. I also am of opinion that this rule should be discharged.

The written agreement that was produced in proof required some parol evidence to show its application: and it might properly be explained by showing the nature and character of the dealings prior and subsequent to it: and I think the evidence given was quite consistent with the guarantee itself, and with the expansion of it in the declaration.

The question then remains, whether there is a sufficient consideration for the defendant's promise, express or necessarily to be implied, upon the face of the instrument. It is contended that there is not, inasmuch as the promise extends to past, as well as to future, debts. The argument, however, goes to show, not the absence of a consideration, but rather its inadequacy. But that is not a question for us; we have nothing to do with the prudence or imprudence of the bargain. Messrs. Claridge, Brothers, & Nicholls, may have been merchants in high credit, to whom a continuance of their transactions with the plaintiffs' house might be of the greatest possible importance. The written guarantee, explained as it is in the declaration and by the parol evidence, shows an ample consideration for the defendant's promise.

I also think the declaration sufficient.

Rule discharged.

*WOOD v. WEDGEWOOD. Jan. 28.

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In a declaration in trespass *quare clausum fregit*, the first count charges a trespass in "a certain close called the Church Meadow, and a certain other close called the Garden." The second charges a trespass in the same closes, "in other parts thereof." The defendant pleads a public right of way over the closes in the declaration mentioned. Upon proof of one public right of way over these two closes, the defendant is entitled to the verdict upon an issue taken on the right of way pleaded.

TRESPASS quare clausum fregit. The first count of the declaration stated that the defendant, on the 9th of April, 1844, and on divers other days and times, &c., with force and arms broke and entered the closes of the plaintiff, situate in the parish of Burslem, in the county of Stafford, that is to say, a certain close called the Church Meadow, and a certain other close called the Garden; and then broke down, prostrated, &c., divers posts, rails, &c., then standing and being in and upon the said closes respectively, and being part of the fences and enclosures thereof, and then also broke down, prostrated, &c., divers, to wit, twenty perches of the hedges and fences of the plaintiff of and belonging to the said closes respectively, &c.; and then also dug up and subverted the soil of the said closes respectively, and with feet in walking trod down, &c., the grass and herbage, &c.

The second count stated that the defendant, on the 23d of April, 1844, and on divers other days and times, &c., with force and arms broke and entered the said closes of the plaintiff *in other parts thereof*, and then broke down, prostrated, &c. &c.

The defendant pleaded, that, before and at the several times when, &c. in the declaration mentioned, there was, and of right ought to have been, a certain common and public highway into, through, over, and along the said closes in the declaration mentioned in which, &c., for all the liege subjects of the Queen to go, return, pass, and re-pass on foot, at all *274] times, &c., and justified the *trespass in the declaration as committed in assertion of such right of way.

The plaintiff replied, that there was not, nor ought there of right to have been, at the said several times when, &c., or either of them, a common or public highway into, through, over, and along the said closes in which, &c., in the declaration mentioned, *modo et formâ*: and he new-assigned, that he had issued his writ and declared against the defendant, not only for the trespasses in that plea mentioned and therein attempted to be justified, but also for that the defendant, on the said several days and times in the *first* count of the declaration mentioned, with force and arms, &c., broke and entered the said closes in which, &c. in the said first count mentioned, and then broke down, prostrated, &c., the said posts, rails, &c. in the declaration mentioned, and then dug up and subverted the said earth and soil of the last-mentioned closes, and with feet in walking trod down, trampled upon, and consumed the grass and herbage thereof, as in the said first count was mentioned; and also for that the defendant, on the said several days and times in the *second* count of the declaration mentioned, with force and arms broke and entered the said closes of the plaintiff *in the said other parts thereof*, as in the said second count mentioned, and then broke down, prostrated, damaged, and destroyed the posts, rails, &c., in manner and form as in the said second count was alleged, on other and different occasions, and for other and different purposes than the occasions and purposes in the plea men-

tioned, and in other and different parts of the said closes respectively, out of the said supposed way in that plea mentioned, *modo et forma*, verification, and prayer of judgment for damages in respect of the trespasses newly assigned.

The defendant joined issue on the replication, and paid into court 40s. in respect of the trespasses so *newly assigned, which the plaintiff [*275 accepted in satisfaction.

The cause was tried before TINDAL. C. J., at the last Staffordshire assizes. The evidence was conflicting; but the jury affirmed the existence of a public right of way over the closes in question, whereupon it was insisted, on the part of the plaintiff, that, by the course of the pleadings, the defendant had bound himself to prove *two* separate and distinct rights of way over both the closes mentioned in the declaration, whereas the jury had only found *one*, and that consequently the plaintiff was entitled to the verdict. His lordship, being of this opinion, directed a verdict to be entered for the plaintiff, reserving to the defendant leave to move to enter it the other way.

Shee, Serjt., in Michaelmas term last, accordingly obtained a rule nisi. *Webber v. Sparkes*, 10 M. & W. 485, was referred to.

Tufourd, Serjt., (with whom was Sir *T. Wilde*, Serjt.,) showed cause. The declaration contained two counts charging two distinct trespasses; and the defendant having pleaded only one right of way, one count is left wholly unanswered. In *Ellison v. Isles*, 11 Ad. & E. 665, 3 P. & D. 391, to a declaration in trespass *quare clausum fregit*, the defendant pleaded a right of way over the close in which, &c.; the plaintiff new-assigned extra the way in the plea mentioned, to which the defendant pleaded that the plaintiff obstructed the way in the plea mentioned, wherefore the defendant deviated; the plaintiff replied *de injuriâ*: and it was held, that on this record the plaintiff was entitled to apply the evidence to a way across the close *which he admitted, and which had not been obstructed; [*276 and that the defendant could not prove his case by showing that another way which he claimed across the close, which was disputed by the plaintiff, had been obstructed—upon the principle, that, wherever the precise locality becomes material to the defence, it lies upon the defendant to fix it. (a) [MAULE, J. In that case the defendant failed in proof of all the matters put in issue by *de injuriâ*. Here, the defendant by his plea answers the whole: all the trespasses were committed in the exercise of the right of way pleaded. The declaration charges that the defendant trespassed in a certain close called the Church Meadow, and in another close called the Garden: the defendant pleads that there is a public right of way over the closes in the declaration mentioned, and that he committed the alleged trespasses in the assertion of that right. However separate the counts may be, the defendant may justify the whole.

(a) See 1 Wms. Saund. 81 a, n. (3), to *Lowe v. King*, and 2 Wms. Saund. 5 b, n. (3), to *Mallor v. Walker*.

TINDAL, C. J. The question is, whether alleging a trespass in a close, and in *other parts thereof*, is the same as alleging distinct trespasses in different closes. MAULE, J. The only issue on these pleadings was, whether or not there was a public footway over the closes mentioned in the declaration. The jury have found that there was, and consequently the verdict ought to have been entered for the defendant.]

Shee, Serjt., *contrà*, was stopped by the court.

TINDAL, C. J. Upon further consideration, it appears to me that the defendant is entitled to the verdict. The second count, which states that the defendant, on, &c., and on other days and times, &c., broke and *277] entered *the said* closes of the plaintiff in *other parts thereof*, is altogether idle, and carries the complaint no further than the first count. If, indeed, the second count had alleged a trespass in a close by a particular name or description, (a) the case might have been different; for, then it might virtually have been considered as a distinct act of trespass from the trespasses charged in the first count: but, as it merely alleges trespasses in *other parts of the same closes*, it charges no more than is already disposed of on the new-assignment.

MAULE, J. The plaintiff complains that the defendant, on a certain day, and on divers other days, committed trespasses in a close called the Church Meadow, and in a certain other close called the Garden; and also that the defendant, on a certain other day, and on divers other days, committed trespasses in *other parts of the same closes*. To this the defendant pleads that there is a public right of footway over the closes in the declaration mentioned, and that he committed the trespasses charged in the declaration in assertion of such right of way. To this plea the plaintiff replies that there is no right of public footway over the closes in which, &c., and new-assigns that the defendant committed the alleged trespasses out of the way alleged in the plea. The defendant pays into court 40s. to cover the trespasses newly assigned. The only question therefore is, whether or not there was a right of public footway over the closes called the Church Meadow and the Garden; the jury have found that there was: the defendant therefore is clearly entitled to the verdict.

The rest of the court concurring,

Rule absolute.

(a) If the second count had stated a trespass committed in a close not mentioned in the first count, the question would have been whether the evidence showed the existence of a way over that close also.

*278] *CUTHBERT v. DOBBIN and COLE. Jan. 28.

The defeasance of a warrant of attorney contained an agreement that no execution or executions should be issued upon the judgment entered up thereon until default in the payment of an annuity; but that, in case of default, it should be lawful for the grantee, his executors, &c., to sue out execution or executions thereon—not saying, “from time to time:” the defeasance also contained a proviso for entering satisfaction after the decease of the grantor, and full payment of the annuity up to the day of his decease:—*Held*, that the guarantee was not restrained by this defeasance from issuing successive executions for arrears.

On the 26th of February, 1836, the defendant Dobbin granted to the plaintiff an annuity of 27l. 3s. for the life of the grantor, to secure which the two defendants joined in a warrant of attorney to confess a judgment for 400l. and costs, with a defeasance stating such warrant of attorney to be a collateral security for the due payment of the annuity, and that "no execution or executions should be issued upon the said judgment until some payment or portion of the said annuity should be in arrear, and unpaid for the space of twenty-one days after the time appointed for payment thereof in the grant; but that, if any such default should be made, then it should be lawful to and for the grantee, his executors, administrators, and assigns, to sue out execution or executions upon or by virtue of the said judgment as aforesaid, as he or they should think fit, for the recovery of the arrears of the said annuity, and all costs, charges, and expenses occasioned by the non-payment thereof." The defeasance also contained a proviso, that, "after the decease of the grantor, and full payment to the grantee, his executors, administrators, and assigns, of the said annuity, and all arrears thereof up to the day of his decease, and all such costs, charges, and expenses as aforesaid, the grantee, his executors, administrators, or assigns, should, at the request, costs, and charges of the grantee and his surety, their heirs, executors, or administrators, or any of them, acknowledge satisfaction *upon the record [279 of the said judgment in due form of law," &c.

On the 16th of March last, the defendant Cole was taken in execution under a judgment entered up on this warrant of attorney for 400l., endorsed to levy 14l. 12s. 6d., being half a year's annuity, and costs. On the 18th he paid the amount, and was discharged.

Channell, Serjt., upon affidavit of the above facts, now moved, on behalf of Cole, the surety, to enter satisfaction on the roll and in the masters' book. He submitted, that, the surety having been once taken in execution and discharged, he could not be taken again, inasmuch as the defeasance did not provide for repeated executions. [CRESSWELL, J. Not in the usual terms: but it speaks of execution or executions.] These words would be satisfied by execution by *fi. fa.* or *ca. sa.*, or by separate executions against the principal and the surety.(a) If it had been so intended, the defeasance would have provided for the issuing of execution from time to time.

TINDAL, C. J. This motion is against the obvious intention and the honesty of the transaction. I think the words of the defeasance are clearly sufficient to justify repeated executions as often as occasion may arise.

CRESSWELL, J. I cannot entertain a doubt in this case: and I think the view taken by the court is strengthened by the proviso for entering satisfaction.

The rest of the court concurring,

Channell took nothing

(a) The judgment being joint, the execution or executions must be joint.

280] *JACKSON and Another v. GALLOWAY. Jan. 29.

In assumpsit on a memorandum of charter, the declaration contained a special count, and also an *indubitatus* count for demurrage. The jury having found for the plaintiffs with 170*l.* damages, the plaintiffs, after repeated discussions before the judge who tried the cause, elected to enter up the verdict on the first count. The defendant brought a writ of error, and the court of Exchequer Chamber reversed the judgment, on the ground that no sufficient consideration was disclosed in the first count. Two years after the judgment of reversal was pronounced, the plaintiffs applied to this court for leave to amend the *postea* by entering the verdict on the fourth count instead of the first (contending that the evidence was equally applicable to both), and to make the judgment-roll conformable to the amended *postea*.—*Held*, that the application was too late.

Quære, whether this court had power to make such amendment *after judgment* in the court of error.

ASSUMPSIT upon a memorandum in the nature of a charter of affreightment of the ship *City of Rochester*, on a voyage from Pembroke and Cardiff to Alexandria. The first count of the declaration stated that the charter was made "between certain persons trading under the firm of G. L. Jackson and Sons, on behalf of the owners of the vessel, and the defendant;" that it was agreed that the ship (then at Pembroke) should with all convenient speed sail to Cardiff, and there load a certain quantity of iron and coals, and should proceed therewith to Alexandria, and there deliver the same on payment of freight, &c.—forty running days to be allowed for loading at Cardiff and for unloading at Alexandria, to commence on the 16th of December, 1834. Mutual promises. Averment, that the ship, then being at Pembroke, by and with the *consent of the plaintiffs and the defendant* and at the *request of the defendant*, remained at Pembroke for the purpose of receiving certain coals, part of the cargo for the voyage, in lieu of loading such coals at Cardiff, as in the charter-party mentioned: that the ship was, without any default or neglect of the plaintiffs, kept and detained for that purpose at Pembroke until the 17th of December; that the defendant dispensed with, and discharged the
 *281] *plaintiffs* *from performing that part of the charter-party which related to the sailing of the ship with all convenient speed from Pembroke to Cardiff up to and until she had finished and completed the loading of the coals at Pembroke; that, being so loaded, the ship with all convenient speed proceeded to Cardiff, and arrived there on the 10th of January, 1835, and took in the remainder of her cargo. Four breaches were assigned—first, that the defendant detained the ship at Cardiff twenty days over and above the lay days and days of demurrage in the charter-party mentioned, whereby *the plaintiffs* were put to expense, &c., and whereby a large sum of money, to wit, &c., became due and payable to *the plaintiffs*: secondly, that the defendant further detained the ship at Alexandria, whereby *the plaintiffs* were put to further expense, &c.; thirdly, that, although a large sum was due to *the plaintiffs* for freight the defendant refused to pay the same; fourthly, that the defendant neglected to pay a certain sum due for demurrage.

There was a second count, for general average ; a third, for freight and primage ; a fourth, *for the hire of ships retained and kept on demurrage* ; a fifth, for money paid ; and a sixth, for money found due upon an account stated.

The defendant pleaded fourteen pleas:—first, non assumpsit to the whole declaration ; secondly, as to so much of the first count as related to the demurrage, that the defendant did not consent and request that the ship should remain at Pembroke for the purpose in the first count mentioned ; thirdly, to the same part of the first count, that the ship was not detained by the defendant at Pembroke for the purpose mentioned ; fourthly, to the same part of the first count, that the defendant did not discharge the plaintiffs from performing that part of the charter which related to the sailing of the ship with all convenient speed from Pembroke aforesaid *to Cardiff aforesaid, up to and until the time the ship had finished and completed the loading of the said coals on board [282 thereof at Pembroke aforesaid ; fifthly, to the same part of the first count, that the ship, being so loaded with coals as in that count mentioned, did not with all convenient speed sail and proceed to Cardiff aforesaid, *modo et forma* ; sixthly, to the same part of the first count, that the ship was not at Cardiff on the 10th of January, 1835, ready to receive the cargo ; seventhly, to the same part of the first count, that the defendant did not keep or detain the ship at Cardiff any part of the time in the first count mentioned over and above the lay days and days of demurrage in the charter-party mentioned ; eighthly, as to so much of the first count as related to the keeping and detention of the ship at Alexandria, that the defendant did not keep or detain the said ship after she was ready to unload, and after such notice as in the first count mentioned, any part of the time in the first count mentioned over and above the said lay days, or the said ten days of demurrage in the charter-party mentioned ; ninthly, as to so much of the first count as related to the claim for demurrage therein mentioned, and the promise of the defendant in that count also mentioned so far as the said charter-party and promise respectively related to the running days to be allowed to the defendant for loading the ship at Cardiff and unloading at Alexandria, that, after the making of the same, it was mutually agreed by and between the plaintiffs and defendant, that the forty running days should commence three days after the ship's arrival at Cardiff, and averred that the ship did not arrive at Cardiff until the 19th of January, 1835, and that the defendant loaded the ship at Cardiff and unloaded her at Alexandria, and did not detain her beyond the forty days so calculated ; tenthly, as to so much of the first count as related to freight and primage, that no *part of the [283 50*l.* in that count mentioned became due and payable to the plaintiffs for freight and primage ; eleventhly, as to so much of the first count as related to freight and primage, that the freight and primage on the voyage amounted to 864*l.* 3*s.*, which, after allowing a discount of 5*l.*

per cent., was reduced to 819*l.* 3*s.*, and that the defendant duly paid that sum to the plaintiffs and to the captain, being all that was payable under the charter-party; twelfthly, a plea as to part of the first count, as to 200*l.*, part of the freight and primage in that count mentioned to be reserved for the use of the captain and paid to him at Alexandria.

The thirteenth and fourteenth pleas were pleaded, respectively, to the second and third counts.

The plaintiffs joined issue upon the first eight pleas, and also upon the tenth and thirteenth, replied *de injuriâ* to the ninth, twelfth, and fourteenth, and replied to the eleventh that more was due for freight and primage than the sum mentioned in that plea.

The cause was tried before TINDAL, C. J., at the adjourned sittings at Guildhall after Hilary term, 1838, when a verdict was found for the plaintiffs, damages 170*l.*, for demurrage due for the detention of the ship. In the following Easter term, at rule nisi was obtained, on the part of the defendant, for a new trial, or to reduce the damages; this rule came on for argument in Michaelmas term, and was discharged: see the first report of this case.^(a) The defendant thereupon brought a writ of error. The case was argued in the Exchequer Chamber in Trinity vacation, 1841; and in Hilary vacation, 1842, that court reversed the judgment of the court below, holding that the declaration was bad, for not showing by distinct averment, or by necessary implication, that *the plaintiffs* were *284] owners of *the ship*, or parties to the charter-party; and that the declaration could not be aided in respect of this defect by any admission in the pleas: see the second report of this case.^(b)

Sir T. Wilde, Serjt., in Michaelmas term, 1844, on the part of the plaintiffs, obtained a rule calling upon the defendant to show cause why the *postea* should not be amended by entering a verdict for the plaintiffs on the *fourth* count in the declaration, and by entering a verdict for the defendant on the issues joined on the *first* count; and why the judgment-roll should not be amended by making the same conformable thereto; and why there should not be a new taxation of the costs, with reference to such amendments. He cited *Richardson v. Mellish*, 3 Bingh. 346, 11 J. B. Moore, 104, and *Scales v. Cheese*, 1 Dowl. & L. 657. The affidavit upon which the motion was founded, stated, that, upon an attendance before the Lord Chief Justice for the purpose of settling the *postea*, the verdict was entered as follows: for the plaintiffs upon the issue joined upon the plea of non assumpsit, except so far as related to the third, fourth, and sixth counts, and, as to them, for the defendant; for the defendant upon the tenth and eleventh issues; and upon all the rest, for the plaintiffs, except as to so much of the first issue as related to the second and fifth counts, as to which the jury were discharged; that the ground upon which the judgment of this court was reversed was an entire surprise to the plaintiffs

(a) *Jackson v. Galloway*, 5 New Cases, 71, 6 Scott, 796.

(b) *Galloway v. Jackson*, 3 Mann. & Gra. 960, 3 Scott, N. R. 753.

not being alluded to either in the assignment of error or in the points marked for argument; nor was it known to the plaintiffs until it was suggested upon the argument in the court of error; that it was wholly unconnected with the merits of the case, and of a technical nature, *namely, [*285 that it did not appear upon the first count that the charter-party had in fact been made by G. L. Jackson & Sons as agents and on behalf of *the plaintiffs*, and therefore, although it sufficiently appeared on the whole record that the plaintiffs and G. L. Jackson & Sons were in fact identical, yet, as the verdict for the plaintiffs was entered on issues arising out of the first count, instead of the indebitatus count, (which was equally supported by the evidence,) judgment upon the verdict on the issue joined on the plea of non assumpsit to the first count must be reversed, on the ground that no sufficient consideration appeared, the identity of the above parties not being alleged.

Talfourd and *Byles*, Serjts., now showed cause. The affidavits in opposition to the rule stated, that, shortly after the plaintiffs had delivered the declaration, the defendant's attorney conceiving that the first and fourth counts were a violation of the fourth general rule of Hilary term, 4 W. 4, which prohibits several counts unless a distinct subject-matter of complaint is intended to be established in respect of each, applied to VAUGHAN, J., at chambers, under the sixth rule, to strike out one or other of those counts: that the summons for that purpose was opposed by counsel on the part of the plaintiffs, and the learned judge not only declined to strike out one of the counts, but also declined to endorse upon the order, pursuant to the seventh rule, that he was satisfied that some distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each of the counts; that the defendants appealed to the court, who referred the matter back to Mr. Justice VAUGHAN, who then endorsed upon the summons as follows: "I certify that I am satisfied, upon cause shown, that a distinct matter of complaint is *bonâ fide* intended to be established in respect of each of the *counts which the defendant [*286 has applied to expunge as superfluous:" that, at the trial, the Lord Chief Justice was requested by the defendant's counsel to certify, that, in his opinion, there was no distinct subject-matter of complaint intended to be established in respect of each of the counts so allowed; but that nothing was done, the Lord Chief Justice merely intimating an opinion that this might be done at any time before final judgment, and that the special count alone was of any consequence: that the evidence adduced at the trial would not have supported the plaintiffs' claim for demurrage under the fourth count, such claim being, in a great degree, founded on the alleged variation of the contract between the parties by the consent and at the request of the defendant, which could not have been given in evidence, or have entitled the plaintiffs to damages, under the general count for demurrage: that, after the rule for a new trial, or to reduce the damages, had been disposed of, several meetings took

place before the Lord Chief Justice for the purpose of settling the *postea*, the plaintiffs attending by counsel, when every finding in the *postea* was fully discussed; and, in particular, the question as to the findings on the issue on non assumpsit was much and strongly contested, and deliberately considered and determined by his lordship, who, by a memorandum in writing, directed the *postea* to be entered up on that issue as the same was afterwards entered up: that his lordship was not required, on the part of the plaintiffs to enter the verdict on the fourth count only for the plaintiff, giving the defendant the verdict on the issues on the first count; but, that, if such requisition had then been made, the deponent (the defendant's attorney) would have assented thereto: that, if the *postea* had been entered up in the mode in which it was sought by the present motion to enter it, no writ of error would have been brought: that one of *287] the "points for argument delivered to the judges on the part of the plaintiff in error, was as follows—"The plaintiff in error will contend that there is no consideration upon the face of the declaration moving from the plaintiffs in the action, sufficient to support the promise;" that the point was fully argued before the court of error as well on the part of the defendants in error as of the plaintiff in error; that there was no application then, or before or at the time of the delivery of the judgment of the court of error, either to that court, or to this court, for leave to amend the *postea* or the record, or in any way with reference thereto; and that the defendants in error took no steps for altering the *postea* until long after the judgment of the court of error had been pronounced, and until after the plaintiff in error had obtained and was entitled to the benefit of that judgment.

The court has no power to make the amendment prayed; and, if it had, the circumstances of the case are not such as would warrant an exercise of its discretion in favour of the plaintiffs. This is an attempt to carry the principle of amendment much further than was done in the case of *Richardson v. Mellish*; for, not only has a writ of error been brought, but the judgment of the court of error has been pronounced, and more than two years have since elapsed. The rule, in effect, seeks to make null and void the judgment of the court of error; which would be carrying the doctrine of amendment infinitely further than has ever yet been done. The application is, to amend the *postea*, which the parties, after much discussion, elaborately settled several years ago, and to enter the verdict on the fourth count, and for a new taxation of the costs. The effect would be, that the judgment on record in the Exchequer Chamber would be made palpably erroneous, and the plaintiffs would reverse it in the House of Lords. [MAULE, J. The effect would be, *288] that the House of Lords, instead of being "the court of ultimate appeal, would be the first court to pronounce a judgment on the record as altered.] *Richardson v. Mellish*, 3 Bingh. 346, 11 J. B. Moore, 104 was an action of assumpsit for the breach of an agreement.

The declaration contained four counts, some of which were bad in law; the defendant pleaded the general issue only: and the jury found a general verdict for the plaintiff. The evidence applied to the first count only. After writ of error brought, and after argument in the court of King's Bench, (*but before judgment*,) this court ordered the postea to be amended, by entering the verdict for the plaintiff on the first count, and for the defendant on the others: and they afterwards ordered the judgment-roll to be amended by the amended postea, after the judgment of this court had been reversed and entered of record in the court of error. An application was subsequently made to the court of King's Bench (a) to amend the judgment returned into that court, by the amended judgment of the court of Common Pleas; and that rule was made absolute. When the case came before the House of Lords, (b) they held that it is not competent to a court of error to examine into the propriety of an amendment of the record made by the court below, being a court of record, although the order for the amendment is sent up as part of the record. (c) [MAULE, J. That shows that the decision of this court upon this motion is one that no court has power to review.] In *Scales v. Cheese*, 1 Dowl. & L. 657, also, it was held by the Exchequer Chamber, that a court of error will not review the propriety of an amendment made by the court below in its record or process, though such amendment was made "after writ of error brought. The like doctrine was laid [*289 down by the court of King's Bench in *Salter v. Slade*, 1 Ad. & E. 608, 3 N. & M. 717. *Harrison v. King*, 1 B. & Ald. 161, affords a safe guide for the determination of this case. There, a general verdict having been taken for the plaintiff, the court of King's Bench refused to entertain an application for entering the verdict on particular counts, according to the evidence on the judge's notes, after a lapse of eight years, and after the judgment had been reversed in error for a defect in one count. In that case Lord ELLENBOROUGH said: "Although the plaintiff might have been permitted to indulge in sleep for a season, he should have been aroused by the writ of error. The moment the writ of error was brought, it was notice to a man who did not sleep the sleep of death over his rights." ABBOTT, J., said: "As I understand the present application, it is made to the Chief Justice in court, in order that he may have the benefit of our assistance. I have no hesitation in saying, that, at this distance of time, the prayer of the petition ought not to be granted. Where a declaration consists of many counts, it is the duty of the plaintiff to consider, at the trial, upon what counts he will have the verdict entered, and to apply to the judge at that time, in order that the verdict may be entered on the good counts: but, as this must necessarily be attended with great delay at the trial, it has been the habit and prac-

(a) See *Mellish v. Richardson*, 7 B. & C. 819.

(b) See *Mellish v. Richardson*, 9 Bingh. 125, 2 M. & Scott, 191, 1 Clark & Finn. 224.

(c) Vide *The Bishop of Exeter v. Gully*, in error, 5 Mann. & Ryl. 457.

tice to do that afterwards which could not conveniently be done at the trial. But still, I think the application should be made recently after the trial; for the judge bears then in memory much of what has passed at the time; whereas it is impossible to suppose that at a great distance of time any human memory can recollect the circumstances. Besides, if, by looking at his notes, the judge should require the assistance of counsel, *290] that assistance may be afforded to him upon a recent application; but, if it is to be deferred for a great length of time, the counsel who were employed in the cause may have ceased to fill that character, or, if not, still their memory cannot be so distinct as to convey that information to the judge which they might have done if the application had been recent. The event in this case is rather unfortunate; but the plaintiff has no reason to complain, inasmuch as the bringing of the writ of error might have awakened his suspicions, and he might then have called in the assistance of his counsel in order to ascertain if there were any exceptionable counts in his declaration." And HOLBORN, J., added, "When the writ of error was brought in 1810, the year after the trial, the attention of the plaintiff ought to have been awakened, and he ought then to have seen whether there was any error on the face of the record, or in what way he would choose to have his judgment entered. In taking the judgment generally, he has the benefit of costs on the whole declaration; whereas, if he had confined himself to the good counts, he would not have been entitled to his costs for those counts upon which the verdict was entered for the defendant, although he would not have had to pay costs on those counts. For these reasons, it seems to me that this is a motion which, if the court had any jurisdiction over it, ought not to be entertained." So, here, the plaintiffs have chosen their own course deliberately, and in a way the most beneficial, as they conceived, for themselves with regard to costs; and therefore the case is one in which the court would not interfere, even if it had the power to do so. The plaintiffs must now say that the evidence at the trial proved the same cause of action for which they proceeded in the first and in the fourth count; and therefore, that the order of VAUGHAN, J., was violated, either *291] accidentally or intentionally. That which might have been a sound and wise exercise of discretion in *Richardson v. Melish* clearly would not be so under the circumstances of this case, and considering the present state of the law as to pleading several matters. Why have amendments been allowed in any case? Simply to prevent a failure of justice from a mere slip or omission of counsel, or the like. But we may look in vain for a case where a party has been allowed to amend after having exercised a deliberate option, with a view to a larger claim for costs than he would otherwise have been entitled to.

Sir T. Wilde, Serjt., (with whom was *Greenwood*), in support of the rule. That the power to make the amendment prayed exists, there can be no doubt. It is an application to the discretion of the court. The law has

rapidly advanced of late years in the course of allowing amendments, with a view to the removal of technical difficulties; and the present is peculiarly a case for amendment, the objection being one of a purely technical character. This is no more than was done in *The King v. Carile*, 2 B. & Ad. 971, and in *Richardson v. Mellish*, 3 Bingh. 346, 11 J. B. Moore, 104. In the former case, error was brought in the King's Bench upon a judgment at the Old Bailey; and one ground assigned was, that a material fact stated on the record was not true: and the court held such an averment inadmissible, and affirmed the judgment. The fact being as alleged by the defendant below, the court of oyer and terminer afterwards ordered the record to be amended; and their clerk, by a rule of the court of King's Bench, with the consent of the crown, came into the latter court, and made the amendment there. And in *Mellish v. Richardson* the judgment-roll was amended in this court after the judgment had been reversed in the court of King's Bench. [MAULE, J. [*292 The postea had been amended before the judgment of reversal.] The court of King's Bench, acting on the amendment made in this court, reversed its own judgment.(a) In *Petrie v. Hannay*, 3 T. R. 659, the defendant pleaded the general issue and the statute of limitations: a verdict was found for the plaintiff on the first issue, and no notice taken of the last: after error brought, and joinder in error, (which was assigned on this point,) the court allowed the postea to be amended by the judge's notes. So, in *Doe dem. Church v. Perkins*, 3 T. R. 749, it was held that a postea may be amended by the judge's notes at any time, even after final judgment, and a writ of error brought. And in *Henley v. The Mayor of Lyme Regis*, 3 M. & P. 310, 6 Bingh. 100, in an action on the case, charging the defendants (a corporate body) with the non-repair of sea-banks, the declaration contained five counts, the first two stating the defendants' liability to repair by virtue of a charter from the crown, and the others by prescription, and *ratione tenuræ*: at the trial, a verdict was taken for the plaintiff, by consent, on the first two counts, and the jury were discharged as to the other three: the court, on the application of the plaintiff, ordered the postea to be amended, and the verdict to be entered on the first count only, although the judge who tried the cause had declined to interfere. In considering the propriety of granting an amendment, the court does not regard the consequences as to the records and judgments of other courts. In the present case, the plaintiffs are removed from a difficulty which has arisen in some of the cases; for, here, the affidavit of the defendant's attorney shows, that, according to the justice of the case, the verdict ought to be entered in the way now asked. And, as to the argument that the plaintiffs are bound by their election to take the verdict on the first count, the same objection might have been made in *Richardson v. Mellish*, 3 Bingh. 346, 11 J. B. Moore, 104, for, there, the plaintiff successfully resisted a motion for arresting the

judgment on the very point on which he afterwards prayed leave to amend.^(a) [MAULE, J. It is not a mere mistake that is sought to be amended here. The verdict was entered deliberately and advisedly on the first count. The mistake, as it is called, consists in not having alleged in the first count that the plaintiffs were the owners of the ship. The verdict was entered pursuant to the wish of the plaintiffs and the intention of the jury.] The mistake was, in assuming the first count to disclose a good consideration. If the court are satisfied that the evidence given at the trial would have warranted a verdict for the plaintiffs on the fourth count, there can be no sound reason for refusing the amendment. Cases may be suggested where the lapse of time *might* place the court in a difficulty in dealing out justice between the parties: but that is not so here; for, it is agreed on all hands that the amendment sought for is precisely what the justice of the case required at the time. Fines have been amended after the lapse of half a century. The mere lapse of time, therefore, is not a ground upon which the court will determine whether or not they will exercise in this case the discretion which they undoubtedly have.

TINDAL, C. J. It appears to me that the amendment prayed in this case ought not to be allowed. In the first place, I very much doubt whether we have any authority to make such an amendment. No case has been cited in which the court below has assumed such authority after judgment pronounced in a court of error. In **Petrie v. Hannay*, 294] 3 T. R. 659, the case last referred to, the amendment took place before the argument in error: and in *Mellish v. Richardson*, 3 Bingham 346, 11 J. B. Moore, 104, the *postea* was amended before the judgment of the court of error had been pronounced. Here, not only has the case been argued in the court of error, and the judgment of the court pronounced after time taken for deliberation, but the plaintiffs come after the lapse of two years from the reversal of the judgment of this court, and ask us to allow an amendment that will entirely remove the ground upon which the judgment of the court of error proceeded. But it seems to me, in the absence of any authority to support the application, that we have no jurisdiction.

Assuming, however, that we have jurisdiction in the matter, I think that under the circumstances we ought to refrain from exercising it. The amendment which the plaintiffs ask us to allow is, that the judgment should be entered for the plaintiffs upon the third count, and for the defendant on the issues joined on the first count. This, under the circumstances, does not appear to me to be a mere technical amendment. I cannot help thinking, that, if the application to enter the verdict for the plaintiffs on the fourth count had been made at the time of trial, the defendant might have raised objections that are not open to him now; as, for instance, that the plaintiffs could not, upon an *indebitatus* count for

(a) See 9 J. B. Moore, 435, 2 Bingham 229.

demurrage, recover damages for delaying the ship. I do not say that the objection would have been well founded : but the defendant might have tendered a bill of exceptions, if the ruling of the judge at the trial had been against him. The lapse of time also affords a strong argument against entertaining this application. The plaintiffs might have applied to this court to make the amendment now sought, before the argument of the writ of error. *Instead, however, of adopting that course, they took the chance of obtaining the judgment of the Exchequer [*295 Chamber upon the record as it then stood. And, though it is said (and perhaps with reason) that the defendant all along insisted that the fourth was the proper count upon which to enter the verdict, and therefore ought not now to be permitted to object to its being so entered, it seems to me that the argument is as strong the other way against the plaintiffs, who were equally urgent in opposing the entering of the verdict upon that count. After such a deliberate election on the plaintiff's part, I think we ought not to be called upon to interfere ; and, however much the result is to be regretted, it seems to me that upon principle, the proposed amendment ought not to be allowed.

MAULE, J. I am of the same opinion. It is not necessary in this case to pronounce a decision negating the *power* of this court to amend the record at this particular stage of the proceedings : although I am far from expressing an opinion in the affirmative. That which is asked here is more than an amendment ; it is an alteration of the record after a judgment pronounced by a court of error thereon. If we have such power, we have the same power, in any other cause where the judgment is reversed, to amend the record at any length of time after such judgment of reversal. It seems to me a very strong thing to say that this court has such power : and I am much disposed to think that it has not. It is unnecessary, however, to decide that point here. The power to direct in what manner the verdict shall be entered, is, confessedly, in the judge who tries the cause ; and the way in which the verdict should be entered was discussed, some years ago, before the Lord Chief Justice. His lordship, having his notes before him, and a fresh recollection of the facts of the case, decided that the verdict *should be entered for the [*296 plaintiffs upon the issues joined on the first count. We are now asked to reverse that decision. Acting—as alone we can act—as his assessors or advisers in the matter, it seems to me that we cannot properly advise him to alter his decision. The circumstance of so great a length of time having been suffered to elapse, seems to me to be a very important consideration. After so many years the judgment ought to be regarded by all parties as *an accomplished fact*. It is said there was a mistake in the special count. I am by no means satisfied that it was a mistake ; the averment of ownership was probably omitted with a view to relieve the plaintiffs from proving it. Taking it, however, to be a mistake, it was pointed out on the first day of the argument in the Exchequer

Chamber. The plaintiffs did not then ask the court of error to postpone the hearing, in order to give them time to apply to this court for an amendment: they rather chose to argue the point. The court of Exchequer Chamber took a long time to consider their judgment: and the plaintiffs still took the chance of a decision in their favour. At last, finding the judgment of that court against them, they now come here. It would be contrary to all the good sense and justice of the case to entertain the application under such circumstances. Suppose this objection had first arisen on a motion in arrest of judgment; and suppose, after full argument, and time taken to consider, the court had decided in favour of the objection; would they after that have allowed an amendment? I apprehend not. The courts are in the habit of granting amendments where the application is promptly made; but not after judgment pronounced on full argument. This is an *à fortiori* case. Suppose the judgment of the Exchequer Chamber had been in favour of the plaintiffs, they probably would have awaited until its reversal by the House of Lords before they applied to us to amend the record. *To make
 •297] the rule absolute, would have the effect of shaking final judgments in a most inconvenient degree.

CRESSWELL, J. I fully concur in the doubt just expressed by my brother MAULE as to our authority to make the amendment prayed in this case. There is no case to be found where the record has been permitted to be amended after judgment pronounced on a writ of error, except *The King v. Carlile*, 2 B. & Ad. 971. There the court of King's Bench having pronounced judgment on a writ of error upon a judgment at the Old Bailey, that court suggested an application to the criminal court for an amendment, which was allowed, the attorney-general, representing the crown, consenting to such amendment. That case clearly affords no precedent for the present motion. If this court has authority to amend one part of the record, there can be no difficulty in amending another part. Why not, then, at once ask us to amend the first count(a) by relieving it of the technical blunder? That is substantially what is sought by the present motion. Supposing, however, we have authority to allow the amendment, the question is, whether sufficient ground has been laid to induce us to allow it, in the exercise of our discretion. I think it would be a most mischievous exercise of discretion to allow this amendment. Even upon the argument of a demurrer, it is contrary to our practice to allow parties to amend after judgment has been pronounced: it is a thing almost unheard of.(b) And here, although the plaintiffs may

(a) By such an amendment the jury would be made to find that which they never had found, and might formerly have been attainted, where the real falsehood would have been in alleging *quod juratores falsum fecerunt sacramentum*.

(b) When pleadings were *ore tenus* the courts were less strict. After an objection was argued, the unsuccessful party abandoned the objection or the pleading objected to; no formal demurrer being entered, unless the party persisted, notwithstanding the opinion of the court expressed against him.

not have *been cognisant of the precise defect in the first count until the argument in the Exchequer Chamber had commenced, [*298 yet they were then fully apprised of it: but, finding, or hoping, that the impression of the court was in their favour at that time, they chose to rely upon that assumed favourable impression, and abstained from asking this court to amend the record. Even after the argument, the plaintiffs had plenty of time for consideration: they might well have taken alarm, at the length of time the court of error were deliberating, and have come to this court. They have made their election. That would be so, even if the matter were much more recent. The verdict is entered from the judge's notes; it is a mere matter of practice; and the application should be promptly made. The parties went before the judge six years ago. Are we to enter upon the discussion again? I think there is no ground whatever to warrant our interference at this late period. If this point had been raised at nisi prius, possibly the defendant might have said that there was no evidence to sustain the fourth count; and, if the ruling of the Lord Chief Justice had been against him, he might have tendered a bill of exceptions. That is an advantage of which he would be deprived by the course now attempted.

ERLE, J. I also think we have no jurisdiction to make the amendment prayed. When the record was before this court, there was a verdict for the plaintiff on the first count, and for the defendant on the fourth count: and so the record stood when before the Exchequer Chamber. When an action is brought here, the parties have a right to the judgment of two courts of error. The course attempted to be pursued here would deprive the defendant of this privilege. As to the alleged hardship—it appears to me that the plaintiffs introduced two counts upon the same subject-matter *into the record, in violation of the new rules. If the [*299 declaration had been understood as it now is, when the parties were before Mr. Justice VAUGHAN, the plaintiffs would have been put to their election between the first and the fourth counts: and at that time, they would, no doubt, have elected to abide by the first count. They would then have been in the same situation as are many other plaintiffs who have elected to abandon the count that would have been most beneficial for them, and who, after having failed upon the count they chose to rely on, come to ask the court to restore that which they had elected to strike out.

Rule discharged, with costs.

M'ALPIN v. GREGORY. Jan. 28.

Upon a motion for a *distringas*, it is not enough that the affidavit negatives the appearance of the defendant, "according to the exigency of the writ" of summons.

C. JONES, Serjt., moved for a *distringas* upon an affidavit negating the appearance of the defendant, "according to the exigency of the writ" of summons.

MAULE, J. That is not enough : it is perfectly consistent with your affidavit that an appearance may have been entered by the defendant on the ninth day after service of the writ of summons.

The rest of the court concurred.

Rule refused.

*300]

*HUNTER v. HUNT. Jan. 30.

The plaintiff and defendant respectively were under-lessees, at distinct rents, of separate portions of premises, the whole of which were held under one original lease, at an entire rent. The plaintiff, having paid the whole rent under a threat of distress, brought an action against the defendant to recover the proportion of rent due from him, as for money paid to his use : — Held, that the action was not maintainable.

THIS was an action of assumpsit brought to recover the sum of 12*l.* 14*s.* 8*d.*, as money paid by the plaintiff to the use of the defendant. The cause came on for trial on the 14th instant, before the judge of the sheriff's court in Middlesex, when a verdict was taken for the plaintiff for the sum claimed, subject to a motion for a nonsuit upon the following agreed state of facts :—

The plaintiff and the defendant were purchasers of two separate under-leases of two adjoining houses. The two houses, and also a vacant piece of ground in the occupation of the plaintiff, were held under one original lease, granted on the 6th of June, 1810, by one James Jefferies to one Samuel Short, at one entire rent of 20*l.* 10*s.* per annum. The plaintiff held the one house as assignee of an under-lease, dated the 20th of June, 1810, from Short to one Harrington, by which a rent of 4*l.* 17*s.* 6*d.* per annum was reserved. The defendant held the other house as assignee of an under-lease, dated the 28th of September, 1810, from Short to one Sharland, by which a rent of 8*l.* 15*s.* 6*d.* per annum was reserved.

The plaintiff, having paid the whole of the rent reserved by the original lease of the 6th of June, 1810, for a year and a half, viz., from Michaelmas, 1842, to Lady Day, 1844, to the representatives of William Randall, the assignee of the reversion, under a threat of distress, brought this action to recover from the defendant the proportion of the rent due in respect of the house held by him, less the property-tax.

Channell, Serjt., on a former day in this term obtained a rule nisi
*301] accordingly. He submitted that the payment *in question was not a payment made by the plaintiff to the use of the defendant.

Manning, Serjt., now showed cause. The remedy at common law, where one of several parties to a common charge undertook to pay it, was, by writ of contribution, the forms of which are to be found in the Register, and also in Fitzherbert's *Natura Brevium*, page 162, B, C, though they commonly related to claims for contribution in respect of suit or service incident to the tenure of real property. Fitzherbert, commenting on this writ, says: "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill, *pro indiviso*, and take the profits equally, and the mill falleth into decay, and one of them will not do any repair to the mill; now, the other shall have this writ to compel him to be contributory to the reparations. And, if there be three or four co-parceners of lands, and the eldest sister do the suit to the lord of whom the lands are holden, for all the co-parceners, and the other co-parceners will not allow her for her charges lost,(a) according to their rate for the same suit, that co-parcener who did the suit may have this writ of contribution." In *Cowell v. Edwards*, 2 Bos. & Pul. 268, it was held that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties; though the insolvency of the principal and of the other sureties be not proved. In 5 Viner's Abridgment, 561, title *Contribution*, pl. 3, it is said: "if a man is bound in a recognisance and dies, there, as long as the heir has assets, execution shall be against the heir only. But,(b) if the heir has not assets, execution shall be upon all the tertenants; and every one shall be contributory to the other; *but, where the execution is sued against the heir [302 who has assets, he shall not have contribution against the tertenants nor the feoffees. If(c) the heir be vouched in ward of several, and the tenant loses, and recovers in value against the heir, every guardian shall be contributory to the render in value:" that is to say, if a real action be brought against A. B., and A. B. vouches to warranty a person under age and in ward, and the tenant loses, all the persons of whom the infant vouchee holds, shall be contributory. [MAULE, J. All this only shows that the plaintiff should resort to equity for relief.] These cases arose before any such equitable jurisdiction was exercised. [TINDAL, C. J. To entitle you to maintain this action, you must show, not only that the money was paid to the defendant's use, but that it is an absolute liquidated and ascertained sum.] "Where feoffee of the conusor upon a statute-merchant is in execution, he shall have contribution against every other feoffee of the same conusor."(d) Again,(e) "If the king's tenant

(a) *Par son charges parde.*

(b) 5 Viner's Abridg. tit. *Contribution*, pl. 4, citing (for both placita) Bro. Abr. *Suit*, pl. 18 and 17 E. 2; Fitzh. *Execution*, pl. 139.

(c) 5 Vin. Abr. tit. *Contribution*, pl. 5, citing Bro. Abr. *Suit*, pl. 12; 48 E. 3, 5, (H. 48 E. 3, fo. 8, pl. 9.)

(d) *Ibid.* pl. 6, citing Bro. Abr. ut *supra*.

(e) *Ibid.* pl. 13, citing Bro. Abr. *Suit*, pl. 19; which refers to Bro. Abr. *Apportionment*, pl. 21; and see F. N. B. 234, 235.

aliens to several severally, and the king distrains the one for the whole, he shall have contribution of the others." That is precisely in point with the present case. It is true, the remedies here spoken of are in respect of real actions which are now abolished: but the rights and the relations of the parties are the same, though their interests are of inferior degree. Again, (a) "The plaintiff seeks relief by way of contribution, for that one of the defendants hath a rent-charge out of his the plaintiff's lands, and one other of the defendant's lands, and seeks to lay the whole burden of the rent-charge upon his the plaintiff's lands; and because the *303] defendant would not answer, therefore an injunction is *granted for staying the suits for the rent." [MAULE, J. I find nothing in Comyn's Digest, title *Pleader*, about *contribution*, and therefore nothing of the course of proceeding for contribution at common law. But I find the subject treated of under title *Chancery*, (2 S.)] In *Harbert's case*, 3 Co. Rep. 13, Lord Coke says: "If a man is bound in a statute or recognisance, and after his death some of his land descends to the heir on the part of the father, and some to the heir on the part of the mother; in this case, one alone shall not be charged; and, if he be, he shall have contribution against the other." That means contribution at common law. Again, in *Viner*, (b) it is said, that, "If a manor is held by the service of a bridge, every tenant of the manor is liable to the whole charge, and are but contributory among themselves." [ERLE, J. In that case, each holds the land subject to the charge. TINDAL, C. J. There is no privity of estate between these parties. CRESSWELL, J. In *Cowell v. Edwards*, 2 Bos. & Pul. 268, the court must have proceeded upon an assumed promise of each of the sureties to bear a portion of the liability. Here, the parties are not sureties.] Each occupier holds subject to the entire rent, and is a surety to the ground landlord for the amount due from his companions. In *Schlencker v. Mozsy*, 3 B. & C. 789, 5 D. & R. 747, the tenant underlet part *by deed*; the original landlord distrained for rent upon the under-tenant; and it was held that assumpsit would not lie by the latter against his lessor upon an implied promise to indemnify him against the rent payable to the superior landlord. So in *Spencer v. Parry*, 4 N. & M. 770, 3 Ad. & E. 331, the implied promise was excluded, not by a deed, but by a written agreement. [MAULE, J. In F. N. B. 162 B, it is said, that, "if many be enfeofed of land for which *304] one suit ought to be done, &c.; *now, if they agree among themselves that one of them shall do the suit, and that the others shall contribute unto him; if he do the suit, and afterwards the others will not allow him for that suit according to their rate, then he shall have the writ of contribution against them; and the writ shall mention the agreement, &c., and, if they cannot agree, then the lord shall distrain them

(a) 5 Vin. Abr. tit. *Contribution*, pl. 18, citing Cary's Rep. 132; 22 Eliz. *Dolman v. Fawcett*

(b) Title *Contribution*, pl. 56, citing 1 Salk. 358, pl. 5; Pasch. 3 Ann. B. R. *The Queen v. The Duchess of Buckingham*.

all for all their suits, if the suit be not done ; but, if one feoffee, of his own will, do the suit for them all, without any agreement for the same made between them, the lord cannot then distrain the others for the suit ; for, as to the lord, it is not material whether there be any agreement between them or not ; but between the feoffees, he that did the suit shall not have the writ of contribution against his companions, without agreement thereof made betwixt them.”(a)] That is precisely the distinction that is sought to be drawn here, between a voluntary payment and a payment *ab invito*. In Bacon’s Abridgment,(b) it is laid down that, “if one of the sureties pays all the bond, yet the obligee is not compellable by law to assign the bond to him, but the surety’s remedy must be in Chancery ; or perhaps he may have remedy by writ *de plegiis acquietandis* :” and to this is added, “*Quære*, whether not in an action for money paid to the other’s use ?” [MAULE, J. In *Cowell v. Edwards*, 2 Bos. & Pul. 268, the defendant was, by the payment, relieved from a personal liability on the bond : here, it does not appear that the defendant had any goods on the premises which were, by the plaintiff’s payment, relieved from a liability to distress.] He would be protected in respect of any property that might be brought upon the premises within six years. [MAULE, J. Upon the statement submitted to us, I am unable to discover any benefit resulting to the defendant from the payment, to the extent of one farthing. It is not shown that the party claiming under the original lessor had any right to re-enter ; nor does it appear that the defendant had any goods upon the premises that could have been distrained. TINDAL, C. J. This would be a most inconvenient way of raising such a question. So great, indeed, is the inconvenience, that I cannot help thinking that the plaintiff’s only remedy is in equity. Suppose there had been fifty sub-lessees instead of two, is the one who pays to bring forty-nine actions for contribution, when the whole might be joined in a bill in equity ? In all the cases cited, there has been a community of interest—a seisin of the whole in one person under whom the parties claim. Here, the plaintiff and the defendant are entire strangers.] The case of *Scott v. Stephenson*, 1 Lev. 71, treats the remedy by writ *de plegiis acquietandis* as a subsisting remedy. There may be no objection, at the present day, to the issuing of a writ of summons in an action “of acquittal of pledges,” but, practically, the remedy has now merged in the action for money paid. The proposition that the plaintiff has no remedy but in equity, amounts to this, that, contrary to a long series of decisions in the cases cited, the subject was at common law without the means of asserting an acknowledged right.

TINDAL, C. J. I never heard of an action of this kind being maintained. Upon the statement submitted to us, I am unable to discover the slightest evidence that the money sought to be recovered, was money

(a) Vide 5 Mann. & Gr. 759, note (a).

(b) Title Obligations (D) 5, citing 1 Lev. 72, *Scott v. Stephenson*.

paid to the use of the defendant. Upon that ground, and without entering upon the learned discussion to which we have been invited, I think the action does not lie.

The rest of the court concurred.

Rule discharged.

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*WALTON v. CHANDLER. Jan. 31.

A warrant of attorney was attested by A., an attorney, introduced to the defendant by the plaintiff's attorney, the defendant thereupon naming A. and requesting him to attend on his behalf, by repeating after the plaintiff's attorney the proper form of words, which were read by the latter from the body of the instrument:—*Held*, that the attestation was good

CHANNELL, Serjt., on a former day in this term, on behalf of the assignees of Thomas Chandler, against whom a fiat in bankruptcy had issued, obtained a rule calling upon the plaintiff to show cause why the warrant of attorney hereinafter mentioned, the judgment, and all subsequent proceedings thereon, should not be set aside, on the ground that the requisitions of the statute 1 & 2 Vict. c. 110, s. 9, had not been complied with. In the body of the warrant of attorney was the following statement:—"And I, the said Thomas Chandler, have expressly named W. J. Meymott of Blackfriars Road, Christchurch, Surrey, gentleman, an attorney of her majesty's court of Common Pleas at Westminster, and requested him to attend on my behalf to inform me of the nature and effect hereof before the same is executed, and to witness the due execution hereof by me; and I acknowledge that the said W. J. Meymott has accordingly informed me of the nature and effect hereof before such execution." The attestation was as follows:—"Signed, sealed, and delivered by the said Thomas Chandler in the presence of me, attorney for and on behalf of the said Thomas Chandler, expressly named by him, and attending at his request, and whom I informed of the nature and effect of the warrant of attorney before the same was executed; and I subscribe as such attorney;" and then followed the name and address of the witness. The affidavit upon which the motion was founded stated that the warrant of attorney was prepared by Mr. Edward Meymott; that the deponent (Chandler) was not informed, nor was he aware, until he attended at the office of Mr. Edward Meymott, that it would be necessary or proper that any attorney should be present on his behalf, to inform him of the nature and effect of the said warrant of attorney at the time such warrant of attorney should be executed, or that it would be necessary or proper for him to name, or request the attendance of, any attorney for that purpose; that, on arriving at the office of Edward Meymott for the purpose of executing the warrant of attorney, he was introduced by that gentlemen to J. W. Meymott, his brother, and was at the same time informed by Edward Meymott that it was necessary that an attorney should be present or attend on behalf of the party sign

ing a warrant of attorney, and that he the said Edward Meymott had provided his brother, W. J. Meymott, to attend as such attorney for that purpose; that the deponent did not assent or agree to W. J. Meymott attending as such attorney, or to his attesting the said warrant, or employ him to act as such attorney or to make such attestation, otherwise than by simply not objecting thereto; and that the warrant of attorney was read over by Edward Meymott, and was signed by the deponent, and attested by W. J. Meymott, without more.

Talfourd, Serjt., now showed cause. The affidavits in answer to the motion (by the plaintiff, and by the two Meymotts) stated, in substance, that, although W. J. Meymott attended at the request of his brother, yet that, when the parties met for the purpose of executing the warrant of attorney, the defendant did expressly nominate W. J. Meymott, and request him to attend on his behalf, to inform him of the nature and effect of the instrument, and to witness his execution thereof; that such nomination and request were made by the defendant's repeating after Edward Meymott the formula, which the latter read from the body of the warrant of attorney; and that the nature and effect of the warrant of attorney, and of his execution thereof, were duly explained to the defendant by W. J. Meymott before he executed it. The learned [*308] serjeant submitted that the directions of the statute had been complied with. He urged that it is not necessary that the attorney should, in the first instance, be named by the defendant: and that it is enough if he adopts the person suggested by the plaintiff's attorney, provided he expressly requests such person to act as his attorney in the matter; as was done here. He cited *Taylor v. Nicholl*, 8 Dowl. P. C. 242, 6 M. & W. 91, and *Hale v. Dale*, 8 Dowl. P. C. 599.

Channell, Serjt., in support of his rule. The absence of fraud will not justify a departure from the course pointed out by the statute; the object of which was to secure to parties executing these instruments the best advice as to the step they are about to take. Undoubtedly it is not necessary that the attorney should be originally nominated by the defendant: the cases cited, to which may be added that of *Barnes v. Pendrey*, 7 Dowl. P. C. 747, show that 1. is no objection that such attorney should be suggested by the plaintiff's attorney. But it is essential that the adoption of the party suggested be such as to show that the defendant is acting without restraint and with a knowledge that he can exercise an option in the matter. "There must," as is said by ALDERSON, B., in *Gripper v. Bristow*, 6 M. & W. 807, 8 Dowl. P. C. 797, "be something different from what may be termed an implied naming, or an implied attendance at his request. It should appear, from the facts of the case, that he was named or attending on behalf of the defendant. It should also be manifest that his express naming and express attendance take place under circumstances which show that he is aware of his having an option in the matter." [ERLE, J. Here "the defendant nominates" [*309]

W. J. Meymott as his attorney, using the very words of the statute. Is he the less his attorney because the words by which he appoints him his attorney are put into his mouth by the plaintiff's attorney?] No case has gone the length of holding that the mere repetition of the formal words after the plaintiff's attorney is such a nomination or adoption as will satisfy the language of the statute.

TINDAL, C. J. It appears to me that this warrant of attorney has been executed in conformity with the directions of the 1 & 2 Vict. c. 110, s. 9. The cases that occurred shortly after the passing of the act, decided, that, unless there were an express and original nomination of the attorney by the defendant himself, the attestation was bad. But, the latter cases,—which are founded upon a better view of the policy of the act,—lay it down, that, if there be a clear and express adoption by the defendant of the party as his attorney, that will suffice, although such party may have been originally suggested by the plaintiff's attorney. And that seems to have been the case here. It is contended, on the part of the assignees, that, inasmuch as the adoption was by repeating after the plaintiff's attorney a form of words read by him from the warrant of attorney, it was not such a free adoption as is required to make the attestation a good one. Those words were introduced into the warrant of attorney, for the express purpose of avoiding the difficulty that had been created by some of the decisions. There being no fraud, and no reason for supposing the defendant to have been at all misinformed of the nature and effect of the instrument he was about to execute, I am of opinion that the statute has been literally complied with.

MAULE, J. I am of the same opinion. The statute requires that the
 *310] defendant's execution of the warrant of attorney shall be attested by an attorney "expressly named by him, and attending at his request. There is no doubt but that W. J. Meymott did *attend* at the request of the defendant, although he did not originally *come* at his request. But it is contended, on the part of the assignees, that he was not expressly named by him. When a man says, "I have expressly named A. B.," who can doubt that that is an express naming of the party? The only fault that can be found with this attestation is, that it has been done in too formal a manner. Such extreme tenacity of form sometimes induces a suspicion of fraud. I never knew a case of jettison conducted in a regular manner, except in one or two instances, where the whole thing was fraudulent. The courts have required such extreme nicety and precision in the execution of warrants of attorney, that no one can consider himself safe unless he takes care literally to comply with the directions of the act. This state of the law sufficiently accounts for the very formal process that seems to have been gone through here. I think that Edward Meymott very prudently and properly took care to avoid all difficulty, by making the defendant repeat after him the very plain and intelligible words which are found in this warrant of attorney. That there

might be no equivocation, he read them from the document itself: and the defendant must be assumed to know what he was about, quite as well as any man does who takes the oaths of allegiance and supremacy in precisely the same manner. All the requisitions of the act have been literally complied with: and, when that is the case, it would require strong proof of fraud to show that there had not been a substantial compliance with it. I think we cannot, consistently with common sense and justice, hold this warrant of attorney to have been otherwise than well executed.

*CRESSWELL, J. *Prima facie* this warrant of attorney appears to have been well executed; and therefore it lies upon the defendant, who seeks to impeach it, to show that there has been a failure to comply with the statute. The defendant very cautiously swears that "he did not assent or agree to the said W. J. Meymott attending as such attorney, or to his attesting the said warrant, or employ him to act as such or make such attestation, *otherwise than by simply not objecting thereto.*" He does not, however, say, that he did not expressly name W. J. Meymott as his attorney, or that he did not expressly request him to attend as such. That which he does state is answered by the counter-affidavits, which show that he did expressly name that gentleman, and did expressly request him to attend on his behalf. The words of the act have been literally complied with; and there is no pretence, and indeed no attempt is made, to impute fraud. I therefore agree that the rule must be discharged. [*311]

ERLE, J. I am of the same opinion. It is quite clear that the defendant has had all the protection the statute intended to afford. He meant to give a warrant of attorney; he knew the consequences of giving it; and the whole transaction was conducted with perfect good faith. It is now sought to be set aside for want of form. It appears, that, in naming W. J. Meymott as his attorney, the defendant used the very words of the 9th section of the 1 & 2 Vict. c. 110. If he understood the English language, he did expressly name W. J. Meymott, and request him to attend on his behalf, to inform him of the nature and effect of the instrument before its execution by him, and to witness its execution. It is conceded that there was no fraud; but it is said, at the same time, that the transaction is to be looked at with suspicion, because the compliance with the statute has been so exact. The mere circumstance of the attending attorney being introduced by the plaintiff's attorney, confessedly does not vitiate the attestation: neither, in my opinion, is it vitiated by a literal compliance with the provisions of the act. [*312]

Rule discharged, with costs

WEST v. COOKE. Jan. 31.

A motion for security for costs may be made, notwithstanding the defendant is under terms to take short notice of trial, or such notice as the plaintiff can give, provided issue be not joined.

THIS was an action of debt against the obligor, on a money bond in the penal sum of 1450*l.*, in which the plaintiff, the obligee, was described as of "No. 3., Serpentine Avenue, in the city of Dublin."

Channell, Serjt., for the defendant, on a former day in this term, issue not having been joined, obtained a rule calling on the plaintiff to show cause why he should not give security for costs, he being resident out of the jurisdiction of the court.

Talfourd, Serjt., showed cause, upon an affidavit stating, that, on the 16th instant, the defendant demanded oyer and a copy of the bond; that, on the 23d and 27th, he obtained orders for time to plead, undertaking to plead issuably, rejoin gratis, and take such notice of trial for the sittings after the present term as the plaintiff could give. He submitted, that, under the circumstances, the application was too late, and evidently made for the mere purpose of evading the defendant's undertaking; and he cited *313] *Muller v. Gernon*, 3 Taunt. 272; *Steel v. Lacy*, 3 Taunt. 273, n.; and *De Montellano v. Garcias*, 1 Bingh. 67, 7 J. B. Moore, 200, where it was distinctly laid down that a defendant cannot call for security for costs after undertaking to accept short notice for trial.

Channell, Serjt., in support of his rule. The general rule is that a defendant may move for security for costs at any time before issue joined. In the cases cited, the undertaking was, to take short notice of trial for a particular day, *issue having been joined*. Besides, here, the defendant's undertaking was coupled with an agreement that it should be "without prejudice to an application for security for costs."

TINDAL, C. J. The rule is as stated by my brother *Channell*. The application for security for costs must be made promptly; and promptness is defined to mean "before issue joined." Rule absolute.

BENAZECH v. BESSETT. Jan. 31.

A claimant who is substituted for the defendant under an interpleader rule, is entitled to call upon a foreign plaintiff for security for costs.

IN the month of June last, the plaintiff, a merchant at Bordeaux, shipped on board a vessel called the *Jack Tar*, at that place, certain wines which, by the bill of lading, were made deliverable to a person trading under the name of L. E. Princever & Co., to whom the bill of lading was transmitted, and who remitted to the plaintiff in payment a bill of exchange accepted by one *Regis Germain*, of Paris, which bill was

dishonoured. *The plaintiff having given notice to the London Dock Company not to deliver the wines under the bill of lading, in September last brought an action of trover against the company, who thereupon obtained the usual order under the interpleader act, to discharge them, and to substitute Bessett, who claimed to be entitled to the wines, as a defendant in their stead. When before the judge upon the interpleader summons, Bessett's attorney asked that the plaintiff might be compelled to give security for costs, he being a foreigner resident abroad. The learned judge, however, thought that he could not make such an order, as the original defendants had not asked for security. [*314

Byles, Serjt., on a former day in this term, obtained a rule nisi for that purpose.

Channell, Serjt., now showed cause. He submitted that the claimant was not entitled to security, the proceedings under the interpleader order being compulsory on him unless he abandoned his claim. He also objected that there was no affidavit of merits.

Byles, Serjt., in support of his rule. Upon a motion of this sort, it is not necessary for the defendant to swear to merits: per *PATTESON*, J., in *The Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. P. C. 573. Being substituted for the original defendants, the claimant is, for all the purposes of the suit, in the same situation as if the action had, in the first instance, been brought against him. No authority can be cited to take him out of the ordinary rule.

TINDAL, C. J. The question is, whether the claimant, who is made defendant under an interpleader rule, is *substituted for the original defendants for all purposes of the suit, and among others for this collateral purpose. I incline to think he stands in the same position as any other defendant, and consequently that he is entitled to the relief now sought for. [*315

MAULE, J. The same mischief exists in this as in all other cases where the action is brought by a foreigner resident abroad. Unless entitled to security, the claimant, if he succeeded, would be without remedy for his costs.

The rest of the court concurred.

Rule absolute.(a)

(a) So, a tenant by receipt has the same rights as the original tenant to the *præcipe*, upon whose default he is admitted to defend. See *Comyn's Digest*, title *Abatement*, (L 31.)

*MUMMERY v. PAUL. Jan. 30.

[*316

In case for a fraudulent representation on the sale of a commission business, the declaration alleged that the plaintiff bargained with the defendant to buy of him his interest in a certain lease, and a certain lease, and certain fixtures, &c., and the goodwill of a certain business, for 700*l.*, and that the defendant, by then falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commission in the course of the business, and the net profits of the trade, were of a certain amount, then sold to the plaintiff the said lease, fixtures, &c., and the goodwill of the said business at and for a certain

sum; and it then went on to allege that the representation was false, and a consequent damage to the plaintiff: *Held*, that, under not guilty, the plaintiff was bound to prove a sale (by production of the agreement between the parties, which appeared to be in writing), as well as a false and fraudulent representation; and that it was not enough to prove an assignment of the lease, &c.

Where a defendant applies to the judge for a nonsuit on the ground that the contract declared on is not proved, and the judge declines to nonsuit, but reserves the point, and the jury find for the defendant, it is competent to the defendant to set up the objection taken by him at the trial, in answer to a rule nisi for a new trial obtained by the plaintiff on the ground that the verdict is against evidence.

CASE, for an alleged misrepresentation on the sale of a business. The declaration stated, that, before and at the time of committing the grievances thereafter mentioned, the defendant carried on the business of a potato-salesman at a messuage and premises situate, &c., and was possessed of a lease of the said messuage and premises for a certain term, to wit, twenty-one years, from the 25th of March, 1827, and was also possessed of certain fixtures then fixed and being in and upon the said messuage and premises, and of a horse, cart, van, utensils in trade, goods, and chattels; that thereupon, theretofore, to wit, on, &c., the plaintiff, at the request of the defendant, bargained with the defendant to buy of him his interest in the said lease, and the said fixtures, horse, cart, van, utensils in trade, goods, and chattels, as also the goodwill of the said trade and business, at and for a certain price and sum of money, to wit, 700*l*.; that the defendant, by then falsely, fraudulently, and deceitfully •317] pretending and representing to the *plaintiff that the amounts received for commission in the course of the said business had been and were at the rate of 900*l*. a year, and that the net profits of the said business had been and were at the rate of 500*l*. a year, then bargained for and sold to the plaintiff the said lease, fixtures, horse, cart, van, utensils in trade, goods, and chattels, and the said goodwill, at and for the said sum of 700*l*.; and the plaintiff, afterwards, to wit, on the day and year aforesaid, paid the defendant for the same the said sum of 700*l*., that is to say, by then paying to the defendant the sum of 400*l*., and by then delivering to the defendant three promissory notes in writing, each made by the plaintiff and one Thomas Mummery, and dated the 27th of May, 1842, and payable to the order of the defendant—one for the payment of the sum of 103*l*. 15*s*., at nine months after the date thereof—one other for the payment of the sum of 106*l*. 5*s*., at fifteen months after the date thereof—and the other for the payment of the sum of 107*l*. 10*s*., at eighteen months after the date thereof; whereas, in truth and in fact, the amounts received for commission in the course of the said business had not been nor were at the rate of 900*l*. a year, but had been and were much less, to wit, 400*l*. a year; and whereas, in truth and in fact, the net profits of the said business had not been nor were at the rate of 500*l*. a year, but had been and were much less, to wit, 50*l*. a year, as the defendant, at the time of making the said false and deceitful representation, well knew: and the defendant, by means of the pre

mises, on the day and year aforesaid, falsely and fraudulently deceived the plaintiff in the said sale, and thereby the said lease, fixtures, horse, van, cart, utensils in trade, goods and chattels, trade and business, had become and were of no use or value to the plaintiff, and the plaintiff had sustained great trouble and expense, to wit, an expense of 200*l.*, in and about carrying on the said trade and business, and endeavouring to dispose of the same, and had been prevented from earning his livelihood, and from acquiring divers great gains and profits which he might and otherwise would have acquired, for a long time, to wit, &c., during all which time he, the plaintiff, had been, and was, necessarily employed in carrying on the said trade and business, and endeavouring to dispose of the same. [*318]

The defendant pleaded not guilty ; whereupon issue was joined.

At the trial before TINDAL, C. J., at the sittings at Westminster after last Trinity term, it appeared that, in April, 1842, the plaintiff caused to be inserted in the Times newspaper the following advertisement :—

“To small capitalists. To be disposed of, an old established whole-sale ready-money business, in the central part of the town, the profits of which average 900*l.* per annum ; the net profit, after payment of rent, taxes, and every expense attendant on the business, exceeds 500*l.* per annum. Coming in, about 700*l.* A previous knowledge of the business is not necessary. For further particulars, apply to Mr. Armson, estate and house agent, 22 Orchard street, Portman Square.”

Upon seeing this advertisement, the plaintiff wrote to Mr. Armson, requesting to be furnished with the particulars.

He received from Armson's clerk the following reply :

“22 Orchard Street, Portman Square.

“15th April, 1842.

“Sir,—The business advertised is that of a wholesale potato-salesman, near Covent Garden, established for many years. The most satisfactory evidence can be given as to amount of net profits, &c., stated in the advertisement. The party now in the business finds it requisite to reside in the country, on account of his health. The sum of 700*l.* includes the goodwill, lease, fixtures of house, also horse, cart, van, utensils in trade, &c. If you entertain the matter, and will make an appointment when you will call upon me, I will give you the address of the party, and all other particulars. [*319]

“P. S.—The business is carried on at his own premises, and not in the market ; by which, I believe, 1*s.* 3*d.* per ton is saved.”

Upon receipt of this letter, the plaintiff again wrote to Mr. Armson, to ascertain if the business would require any further capital than the 700*l.* therein mentioned : to which he received the following answer, signed as before :—

“22 Orchard Street, Portman Square.

“16th April, 1842.

“Sir,—In answer to your note, I beg to acquaint you, that, beyond the 700*l.*, no more capital would be needed to carry on the business, as the potatoes are sent to you for sale on commission. But presuming you had 200*l.* in addition, you would then be able to give facilities in advances to any of the farmers. Of course, any profits arising from that would be over and above the business of 900*l.* per annum.

Upon receipt of this last-mentioned letter, the plaintiff, through his agent, Mr. Lewis, paid Mr. Armson a deposit of 50*l.*, and at the same time addressed to the defendant the following proposal:—

“I am willing, and hereby agree to take the house No. 31, James street, Covent Garden, for the remainder of your term, to pay the same rent and taxes you now pay, and to be, in every respect, subject to the same covenants of lease. Also to purchase the business now carried on by you, and to pay you 700*l.* for the same; to include all the fixtures of house, and utensils in trade, viz. horse, cart, van, &c., a list of which to be given me in six days from this date. This lease or assignment to be made and executed on or before the 31st day of May next, at my expense. The purchase money I agree to pay as follows, viz. 50*l.* now paid down as deposit; a further sum of 350*l.* on or before the 31st of May, on executing the assignment; the remaining sum of 300*l.* to be paid in three promissory notes jointly with my father, Mr. Thomas Mummery, senior, Dover, jeweller; and the first bill for 100*l.* at nine months, and 5 per cent. interest added to ditto; the second at fifteen months, for 100*l.* and interest, and the last at eighteen months, with interest added; all dated from the date of assignment. All rent, rates, &c. to be paid up by you to the time I take possession, viz. the 31st of May, unless the business be completed sooner.”

In reply to this proposal, the plaintiff received from Armson, the defendant's agent, the following note:—

“April 22d, 1842.

“Sir,—Mr. Paul has accepted your proposal for the business, &c., and also the mode of payment.”

The above proposal and reply were tendered in evidence, but were rejected for want of a stamp. An assignment of the lease was however put in.

Evidence was also given by the plaintiff to show that the representations made by Armson as to the nature and extent of the business, were sanctioned by the defendant, and that such representations were untrue.

On the part of the defendant it was contended, that, inasmuch as the negotiation for the purchase of the business terminated in a written agreement, which was not received in evidence by reason of the absence of a stamp, the plaintiff was not entitled to recover, there being no proof of any sale.

On the other hand, it was insisted that the fact of the sale was admitted on the record ; and that all that was put in issue by the plea of not guilty was, whether there had been such a representation by the defendant as that charged in the declaration, and whether it was false.

*His lordship left it to the jury to say whether or not the representations alleged in the declaration had been made by the defendant, and whether they were false. [*321]

The jury returned a verdict for the defendant.

Shee, Serjt., in Michaelmas term last, moved for a new trial, on the grounds that the verdict was against evidence, and that the Lord Chief Justice had erred, in submitting to the consideration of the jury matter that was admitted upon the record. He contended that the *fact* of the representation, being matter of inducement, was admitted, and that its falsehood alone was put in issue by the plea ; and he cited *Taverner v. Little*, 5 New Cases, 678, 7 Scott, 796 ; *Mash v. Densham*, 1 M. & Rob. 442, and *Spencer v. Dawson*, 1 M. & Rob. 552, in the latter of which it was held by PARKE, B., that, in case for deceit in the warranty of a horse, "under the new rules (Hilary term, 4 W. 4, iv.) the plea [of not guilty] put in issue both the warranty and the unsoundness—in short, the whole declaration *except the bargain and sale, which were matter of inducement.*"

TINDAL, C. J. There seems to me to be no ground for granting a rule upon the second point. As I understand the rule, the wrongful act and the motive are virtually and substantially one proposition, and you can not separate the two, and the whole is put in issue by not guilty. The case is distinguishable from those in which the matter is distinctly alleged on the face of the declaration by way of inducement only.

Upon the other point, as to the verdict being against evidence, the case is one which is proper to be reconsidered.

COLTMAN, J. It seems to me that the wrongful act and motive are imbodied together, and are like the case *of slander, in which the plea of not guilty puts in issue the speaking the words, and the speaking them maliciously, and in the sense imputed. [*322]

The rest of the court concurring, a rule nisi was granted accordingly.

Talfourd, Serjt., now showed cause. He submitted that the plaintiff ought to have been nonsuited, inasmuch as he failed at the trial to prove the wrongful act alleged to have been committed by the defendant, namely, the sale by means of a false and deceitful representation of the nature and value of the thing sold. He relied on *Cotton v. Brown*, 3 Ad. & E. 312, 4 Nev. & Man. 831, where it was held that, under the new rules, the plea of not guilty to an action for a malicious prosecution puts in issue the fact of prosecution as well as the want of probable cause.

Shee and *Dowling*, Serjts., in support of the rule. The verdict was clearly against the weight of evidence ; and it is not competent to the defendant now to contend that the plaintiff ought to have been nonsuited at the trial. [MAULE, J. The plaintiff took upon him- If to prove the

sale of the goodwill, but failed to do so. CRESSWELL, J. If there was no sale, it is of no consequence how many falsehoods the defendant told about the matter.] The statement as to the representation was admitted on the record: the declaration is for the deceit. [CRESSWELL, J. For a deceit *on a sale*.] All the allegation about the sale is admitted. [MAULE, J. That which is put in issue is, the fact of the defendant having fraudulently sold the business to the plaintiff: "not guilty" puts in issue the sale and the fraud.] The plaintiff was not bound to put in *323] the written contract. It was clearly *sufficient for him to show

that there was a misrepresentation upon the sale of the lease and goodwill of the business; which sale was well proved by the production of the assignment. In *Dobell v. Stevens*, 3 B. & C. 623, 5 D. & R. 490, —where the vendor of a public-house made, pending the treaty, certain deceitful representations respecting the amount of the business done in the house, and the rent received for a part of the premises, whereby the plaintiff was induced to give a larger sum for the premises, it was held that the latter might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance of the premises, or in a written memorandum of the bargain which was drawn up after those representations were made. At all events, it is not competent to the defendant now to urge this objection. Where an objection that goes to a nonsuit is reserved, that means only in the event of the verdict ultimately being found against the party taking it. In *Dewar v. Purday*, 3 Ad. & E. 166, 4 N. & M. 633, at the close of the plaintiff's case, leave was reserved to the defendant to move to enter a nonsuit: the defendant offered evidence, and the jury retired, and were unable to agree upon their verdict; the judge being pressed to discharge them, no counsel on either side being present, directed a nonsuit on the point which had been reserved. On motion by the plaintiff for a new trial, it was held that the nonsuit was irregular, and that the defendant in showing cause could not argue the point reserved at the close of the plaintiff's case. PATTESON, J., there said: "When leave is reserved, by consent of parties, to move to enter a nonsuit, it is on the understanding that the cause will go on, and the plaintiff obtain a verdict. If by any circumstance he loses that benefit, the consent does not hold. That was the case here."

*324] *TINDAL, C. J. The first question to be determined is, whether the defendant is now in a situation to take advantage of the want of proof of the contract of sale, and to urge the point taken at the trial for the purpose of nonsuiting the plaintiff: and I am of opinion that he is at liberty so to do. If the counsel for the plaintiff had not at the time consented to the reservation of leave to move for a nonsuit, it would have been my duty to direct the jury to find a verdict for the defendant. *Robus sic stantibus*, the offer to go on was for the plaintiff's benefit. It would be singular indeed, if, the jury being against him upon the facts,

and the court against him in point of law, the plaintiff should now be in a better situation than that in which he then stood.

The second question is, whether the exception taken at the trial was a just exception. I think that it was. The declaration states, that the defendant carried on a certain business, and was possessed of a lease of certain premises, and of certain fixtures, &c.; that the plaintiff, at the request of the defendant, bargained with the defendant to buy of him his interest in the said lease, and the said fixtures, &c., and the goodwill of the said business, for 700*l.*; and that the defendant, by then falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commission in the course of the said business had been and were at the rate of 900*l.* a year, and that the net profits of the said business had been and were at the rate of 500*l.* a year, then bargained for and sold to the plaintiff the said lease, fixtures, &c., and the said goodwill, at and for the said sum of 700*l.*: and the declaration then goes on to allege the falsehood of this representation. The only evidence given at the trial to prove the sale, was the assignment of the lease: but that did not comprehend the fixtures, &c.; and it appeared that there was an agreement in writing that *might have included the whole; and that agreement was not produced. It is now [*325 insisted on the part of the plaintiff that it was not necessary to produce the agreement; for, that, under not guilty, which was the only plea upon the record, the fraudulent representation was all that was put in issue. It seems to me, however, that this is like the old action for deceit on a sale, where, under not guilty, both the warranty and the sale were put in issue, the two being inseparable. The case of *Cotton v. Brown*, 3 Ad. & E. 312, 4 Nev. & Man. 831, where it was laid down that the plea of not guilty to an action for a malicious prosecution, under the new rules, puts in issue the fact of prosecution as well as the want of probable cause, appears to me not to be, in principle, distinguishable from the present. Upon the whole, I think we ought not to disturb the verdict.

MAULE, J. I am of the same opinion. This rule calls upon the defendant to show cause why the verdict found for him at the trial should not be set aside, and a new trial had, on the ground that the verdict is against evidence. Looking at the evidence, it appears to me that the only verdict the jury could have found was the verdict which they have found. The declaration alleges that the plaintiff bargained with the defendant to buy of him his interest in a certain lease, and certain fixtures, &c., and the goodwill of a certain business, for 700*l.*, and that the defendant, by then falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amount received for commission in the course of the business, and the net profits of the trade, were of a certain amount, then bargained for and sold to the plaintiff the said lease, fixtures, &c., and the goodwill, at and for a certain sum; *and [*326 it then goes on to allege that the representation was false, and a

consequent damage to the plaintiff. To this declaration the defendant pleads not guilty. When the defendant says he is not guilty, he denies that he has done that which the plaintiff has alleged against him. Now, the only thing the plaintiff alleges is, that the defendant, by means of a fraudulent representation, sold him a certain lease, fixtures, and goodwill. Unless there was fraud, the plaintiff has no ground of action; it was essential also for the plaintiff to prove the sale as alleged. It appeared from the evidence that an assignment of the lease had been executed to the plaintiff. It also appeared that there was an agreement in writing expressing the terms upon which the fixtures, &c., were sold. This agreement was not produced; nor was its non-production properly accounted for. It was clearly necessary under this issue to prove the sale by the only proper medium of proof. It has been said, that, as the misrepresentation complained of had reference to a different portion of the subject-matter of the sale, it was not necessary to prove the agreement. I do not assent to that. The complaint is, that the defendant fraudulently misrepresented the whole subject of sale. The plaintiff was bound to prove the sale. That which took place as to the nonsuit, it is said, only gives the defendant a right to take advantage of the objection where the verdict is the other way. But I apprehend what we have here to dispose of is, a rule for a new trial on the ground that the verdict found by the jury is against the weight of evidence. And, upon full investigation, it appears that there has been a failure of proof on the part of the plaintiff; and therefore, if the cause had been conducted with rigorous strictness, there could only have been a verdict for the defendant. For these reasons, I think that this rule ought to be discharged.

*327] *CRESSWELL, J. I also am of opinion that this rule must be discharged. The action is brought against the defendant for selling a certain lease and certain fixtures and goodwill for a larger price than they were worth, by means of a false and fraudulent representation. The plea of not guilty clearly puts in issue the sale by means of the fraudulent representation: the plaintiff was bound to prove both a sale and a misrepresentation. At the trial, the latter only was proved. The defendant's counsel pointed out the objection, and asked my Lord to nonsuit the plaintiff. The cause, however, was allowed to proceed, the point being reserved. The jury having found a verdict for the defendant, we are now asked to set aside that verdict, on the ground that it is not warranted by the evidence. Upon looking at the evidence before the jury, we are clearly of opinion that the verdict was properly found for the defendant; and, consequently, there is no pretence for making this rule absolute.

ERLE, J. This is an application to the discretion of the court, to grant a new trial on the ground that the verdict is against evidence. The cause of action was, a sale by means of a false and fraudulent representation. The plaintiff complains that he was induced by that false repre-

sentation to make the purchase. It was therefore essential to show that there was a sale, and also that there was a misrepresentation. It clearly was not enough to prove a misrepresentation only. It is said that the production of the assignment sufficiently showed the sale of the lease and goodwill. The whole, however, was one entire bargain, and could only be proved by producing the agreement. I also think the defendant is not precluded from urging the objection taken by him at the trial.

Rule discharged.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Hilary Vacation,

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco in this vacation, were,

TINDAL, C. J.
COLTMAN, J.

MAULE, J.
ERLE, J.

THOMPSON and Another v. SMALL. Feb. 6.

A. chartered a vessel, of which B. was master and part-owner, for a voyage from London to Sydney, for a gross sum of 1600*l.*, payable two months after clearance at the custom-house. A. bought goods of C. to be shipped on A.'s own account on board the vessel, and to be paid for before the vessel left the port of London. The goods were accordingly shipped by C., who took from the mate receipts as for goods shipped on C.'s account, and which receipts were still kept by C. Two days after the goods were shipped, A. became insolvent and unable to perform his contract with C., and subsequently agreed with C. to rescind it, and signed an order directing B. to deliver the goods to them. The goods were demanded on behalf of C., both before and after the rescission of the contract, C. offering at the same time to pay all reasonable charges attending such re-delivery, and every lawful claim the owners might have upon the goods. B. refused to deliver the goods to C., on the ground that, they having been shipped for the voyage stated in the charter-party, it was the duty of B. to convey them to their destination:—*Held*, that, assuming that the property in the goods passed to A. by the shipment, yet, as A. had neither become bankrupt nor taken the benefit of the insolvent act, but continued *ex jure* up to the time of making the agreement to rescind the contract—by the operation of that agreement and the delivery order given by A., the property in the goods re-vested in B., either in his original right as vendor, or as a new right derived from the assignment of the vendee; and that the refusal of B., upon the ground stated by him, to re-deliver the goods after the demand by C., the contract with A. being rescinded, and the offer then made of the payment of the reasonable charges and all lawful claims, was a wrongful conversion; there being nothing in the terms of the charter-party that could restrain the charterer from dealing with the cargo as he thought proper, or prevent him from taking out the cargo before the sailing of the vessel, or to entitle the master to insist on carrying it to its destination.

Quære, whether or not C. derived a new right from retaining the mate's receipt and the demand made by them before the rescission of the contract?

TROVER, for 40 sheets of milled lead, 30 casks of shot, 6 tierces of ground lead, 6 tierces of red lead, 100 boxes of tin-plates, and 100 boxes and 30 casks; of the value of 500*l.*

*The defendant pleaded, first, not guilty; secondly, that the goods were not the property of the plaintiffs; upon which pleas the plaintiffs joined issue. [*329]

At the trial before TINDAL, C. J., at the adjourned sittings in London, after Michaelmas term last, a verdict was found for the plaintiffs, damages 500*l.*, subject to the opinion of the court upon the following case:—

During the time hereinafter mentioned the plaintiffs were lead and tin-plate merchants, carrying on business under the firm of William Thompson & Co., at Allhallows Wharf, London; and the defendant was the master and owner of eight 64ths of the *Bucephalus*.

The action was brought for 394*l.* 6*s.* 2*d.*, the value of certain milled-lead, shot, sheet-lead, white-lead, red-lead, and tin-plates, under the following circumstances:—On the 20th of July, 1843, Theodore Grumbrecht, who then held a responsible situation in the house of Huth & Co., ordered the goods in question of the plaintiffs, to be shipped on his account, on board the *Bucephalus*, then lying in the West India export dock, and then about to proceed to Sydney and New Zealand; and to be paid before the ship left the port of London. [*330]

There was no written contract for the goods, but the order was given verbally by Grumbrecht to one of the plaintiff's clerks.

The goods were accordingly shipped by the plaintiffs on board the *Bucephalus*, by their own barges and servants, on the 27th of July, 1843; and at the time of such shipment the plaintiffs took a receipt for the goods from the chief officer of the vessel, of which receipt the following is a copy:

“Allhallows Wharf, London, 27th July, 1843.

“Received from William Thompson & Co., in good order and well-conditioned, the under-mentioned goods, on board the *Bucephalus*, Captain A. Small, for Sydney:—

“T. G. Nineteen sheets milled lead.

“Sixteen casks shot.

“Four tierces containing ground lead and red-lead.

“Sixty boxes tin-plates.

“Received the above, P. JENKINS, for L. FILLAN,

“Chief officer of the ship *Bucephalus*.”

The plaintiffs have always, from the time of receiving the said receipt up to the present time, retained the same.

On the 26th of July, 1843, the plaintiffs delivered to Grumbrecht an invoice of the said goods, of which the following is a copy:—

“Mr. Theodore Grumbrecht, *“London, 26th July, 1843. [*331]

“Bought of William Thompson & Co.

“T. G. 60 boxes of tin-plates, viz.:—

			£	s.	d.
20 IC	-	-	28	28	0 0
20 IX	-	-	34	34	0 0
20 LXX	-	-	40	40	0 0

16 casks, 20 bags each, containing 320 bags, of shot, 80 cwt. -	19/6	78	0	0
19 sheets of milled lead, 162 cwt. 3 qrs. 24 lbs. - - -	17/6	142	11	11
4 tierces, containing the under- mentioned 100 kegs of genuine ground white lead, 50 cwt. -	23/6	58	15	0
Watching - - - -		0	6	0
10 kegs of red lead, 2 cwt. 2 qrs.	18/6	2	6	3
16 casks 3/4, 4 tierces 6/4, 100 kegs 1/3, 10 ditto 1/4 -		10	7	0
		<u>£394</u>	<u>6</u>	<u>2"</u>

After the goods had been put on board, as above-mentioned, viz., on or about the 29th of August, 1843, Grumbrecht was taken into custody upon a charge of felony preferred against him by Messrs. Huth & Co.

Grumbrecht at the time of his apprehension was insolvent, and unable to pay for the said goods. The plaintiffs, upon the fact of the apprehension and insolvency of Grumbrecht coming to their knowledge, viz., on the 1st of September, 1843, caused a notice, of which the following is a copy, to be served upon the defendant personally:—

*332] “We hereby demand and require you forthwith to re-deliver to Messrs. William Thompson & Co. of Allhallows Lane, London, merchants, the under-mentioned goods, shipped by them, and now on board the ship called the Bucephalus, under your command, bound for Sydney, viz. :—

“T. G. 19 sheets milled lead.

16 casks of shot.

4 tierces containing ground lead and red lead.

60 boxes tin-plates.

“And we further give you notice that the said William Thompson & Co. hereby tender and offer to pay the reasonable charges attending the re-delivery of the said goods, and that, in case you refuse to re-deliver the same, the said William Thompson & Co. will commence an action against you for the recovery of the same; and, in particular, we hereby further give you notice not to deliver the said goods nor sign any bill of lading for the same to, or in favour of, Theodore Grumbrecht, or his order. Dated, this 1st September, 1843.

“To Mr. A. Small, captain of the said ship Bucephalus, and to the owner or owners, and the brokers or broker of the said ship, and whom else it may concern.

“(Signed) VANDERCOM & Co., 23, Bush Lane.

“Solicitors for the said William Thompson & Co.”

The defendant, upon being served with the said notice, stated that he

should not deliver the goods, but that he should hand the notice to his solicitors, and that Vandercom & Co. would hear from them. On the 2d of September, a copy of the same notice was also served, by direction of the plaintiffs, upon Mr. Lindsay, the broker of the *Bucephalus*, who then said that he was only acting as broker, and that he should take the demand to Crowder & Co., and act under their advice.

*On the 4th of September, 1843, the plaintiff's attorneys, Vandercom & Co., received from Crowder & Maynard, then the defendant's attorneys, a letter, of which the following is a copy:—

[*333]

"57 Coleman Street, 4th September, 1843.

"Sirs,—Mr. Small, master of the *Bucephalus*, has brought us your notices on behalf of Messrs. Thompson & Forman and William Thompson & Co.; and we shall be glad to know on what ground you claim the redelivery of the goods there referred to. It is proper to mention that Mr. Grumbrecht, on whose account these goods were understood to be shipped, is himself the charterer of the *Bucephalus* for her present voyage.

(Signed) "CROWDER & MAYNARD."

To this letter Vandercom & Co., on the same 4th of September, replied as follows:

"Sirs,—Messrs. Thompson & Forman and Messrs. William Thompson & Co. are the shippers of the goods in question for Sydney, and they hold the mate's receipts for them. The vendee having failed, they claim to be entitled to stop the goods; vide *Thompson v. Trail*, 2 Carr. & P. 334, and the other cases cited. We apprehend the circumstance of the vendee being the charterer of the ship does not affect the vendor's right to stop *in transitu*; vide *Bohtlingk v. Inglis*, 3 East, 381.

(Signed) "VANDERCOM & Co.

"P. S.—Please let us know immediately what your clients purpose to do. We apprehend our clients are not answerable for freight."

In answer to which last-mentioned letter, Crowder & Co., the defendant's attorneys, on the 5th of September, *1843, wrote, and forwarded to Vandercom & Co., the plaintiff's attorneys, a letter in the following terms:—

[*334]

"57 Coleman Street, 5th September, 1843.

"Sirs,—Unless some general arrangement can be effected in regard to the *Bucephalus*, we are disposed to think that the ship must proceed to her destination with the cargo now on board; and in that case your clients must claim their property (if they are entitled to it) on her arrival out. It is clearly laid down in *Thompson v. Trail*, that the captain would be justified in this course. The case of *Bohtlingk v. Inglis* appears to us an authority for considering the *transitus* of the goods in question as at an end. They are not on board the *Bucephalus* for the purpose of being conveyed from the seller to the buyer, but from the buyer, who has received them into his own ship, to the place he intends to send them to. In the case referred to, Mr. Justice LAWRENCE says,

that, if one purchase goods here, to be sent abroad, and they are delivered on board a chartered ship in a port of this kingdom, such delivery is in effect a delivery to the vendee. On the part of the master and owners, we shall be much better satisfied not to have to discuss these questions; but we have a difficulty in determining what course to adopt, until we learn the intentions of the friends and creditors of Mr. Grumbrecht.

(Signed) "CROWDER & MAYNARD."

To such last-mentioned letter, Vandercom & Co. replied by a letter, dated September 6th, 1843, as follows:—

"The Bucephalus.

"Sirs,—As it is desirable that we should come to some certain determination on the subject of the goods shipped by Thompson & Forman, and W. Thompson & Co., without delay, we purpose to advise with *counsel on the subject, and to act under his advice; and, as it
*335] is desirable we should state the facts accurately, we should be much obliged if you would furnish us with a copy of the charter-party under which the ship was, as we understand from you, to be freighted by Mr. Grumbrecht, as we think the rights of the parties may in some measure depend upon the nature and terms of that instrument.

"We presume that, on the part of the owners and master, you do not claim any interest in the goods themselves, unless in respect of the lien (if any) which your clients may claim to have upon them for freight. We presume also, that you have no notice of any interest in the goods by any other party than Mr. Grumbrecht. Supposing Mr. Grumbrecht is willing to give an order for the re-delivery of the goods, will the master and owners re-deliver upon that order? Our object in these inquiries is, that we may know exactly how we stand, and be fully advised; and your immediate attention will much oblige us.

(Signed) "VANDERCOM & Co."

On the following day Crowder and Maynard replied as follows:—

"Bucephalus.

"Sirs,—We send herewith a copy of the charter-party. The owners have not received notice of any interest in the goods in question other than that of Mr. Grumbrecht. They were entered as shipped on his account. The owners do not claim any interest themselves in the goods, unless in respect of their lien for freight: but the ground on which they now decline to give up the goods is, that they were put on board for the purpose of being conveyed on the charterer's account to Sydney. We are not prepared, under the circumstances, to advise the owners to re-de-
*336] liver the *goods upon the order of Mr. Grumbrecht. We shall be glad to receive copies of the mate's receipts, which are in your client's possession. We presume that you are aware that some, if not the whole of these receipts, had been delivered over by your clients to Mr Grumbrecht, and were afterwards received back from him.

(Signed) "CROWDER & MAYNARD."

The following is a copy of the charter-party (dated the 3d of June, 1843) sent by Crowder & Co. with the last-mentioned letter, and is in fact a copy of the charter by which Grumbrecht had chartered the *Bucephalus* :—

“ It is this day mutually agreed between Messrs. Ross, Corbett, & Co., owners of the good ship or vessel called the *Bucephalus*, now lying in the river Thames, of the measurement of 550 tons, or thereabouts, Andrew Small, commander, and Theodore Grumbrecht, merchant, of London, that the said Messrs. Ross, Corbett, & Co. agree to let, and the said Theodore Grumbrecht agrees to hire the said ship *Bucephalus* for a voyage from London to Sydney, and, if required by the charterer or his agent, to proceed to Wellington and Auckland, in New Zealand, and there the voyage to end : that the said Theodore Grumbrecht, as charterer, to have the whole and entire use of the ship out, for all lawful goods and cabin passengers: the cargo to be taken on board in London, and stowed by the charterer’s own men and stevadore, at his expense and risk; the ship to have sufficient room and accommodation below for her provisions and crew: Captain Small and his chief officer to have a cabin each in the poop: the owners to find captain, officers, and crew in provisions and wages; the charterer to find all the passengers in provisions, water, drinkables, plate, napery, crockeryware, &c.; the ship to clear at the custom-house, and sail from London, wind and weather permitting, on or before the 31st of *August: seventy running days to be allowed [*337 for discharging and receiving cargo at Sydney, Wellington, and finally discharging at Auckland, in New Zealand: twenty days on demurrage, if required, to be allowed at Auckland, at 10*l.* per day: all goods landed and taken on board at Sydney to be on and from the wharf at the charterer’s expense; and all goods discharged at Wellington and Auckland to be landed in the ship’s boats, if required, but at the charterer’s risk; any extra labour or expense required for loading or discharging cargo at Sydney, beyond the ship’s crew, to be paid by the charterer: the vessel to pay her own pilotage and port charges: and in consideration of this, the said Theodore Grumbrecht agrees to pay the said Messrs. Ross, Corbett & Co. the sum of 1600*l.*, to be paid in London, two months after the ship clears at the custom-house: penalty for non-performance of this agreement, 1000*l.*: twenty days’ demurrage in London, if required, at the rate of 5*l.* per day.”

On the 14th of September, 1843, an agreement was made and entered into between the plaintiffs and Grumbrecht, and signed by both the said parties, of which the following is a copy :—

“ Memorandum of agreement made this 14th day of September, 1843, between Messrs. W. Thompson & Co., of Allhallows Wharf, Upper Thames street, London, merchants, of the one part, and Theodore Grumbrecht, of the city of London, merchant, of the other part:

“ Whereas a contract was made and entered into on or about the 20th

and the lighterman in the employ of the plaintiffs, attended on board the ship *Bucephalus* to demand the goods ; and they also took with them an authority signed by Grumbrecht to Chantler, the said lighterman, authorizing him to unship and remove the said goods on account of the plaintiffs, and also an authority from the plaintiffs to receive the same goods on their account, of which the following are respectively copies :—

“ To Mr. F. C. Chantler :

“ I hereby authorize you to unship and remove the goods shipped by Messrs. W. Thompson & Co. on board the *Bucephalus*, now lying in the West India docks, for Sydney and New Zealand, and to receive the same into your possession for and on account of the said Messrs. W. Thompson & Co. Dated, this 14th day of September, 1843.

(Signed) “ THEO. GRUMBRECHT.”

“ To Mr. F. C. Chantler :

“ We hereby authorize and direct you to receive the above-mentioned goods from the ship *Bucephalus*, on our account.

(Signed) “ WM. THOMPSON & Co.”

Upon the arrival of the said parties at the ship on the last-mentioned day, they found Fillan, the chief mate, in charge of the said vessel, and of the goods on board thereof, and they then produced and showed to Fillan, on board the said vessel, the aforesaid original receipt for the *342] goods, the original agreement signed by *Grumbrecht as aforesaid, with a copy of which he had been served by the plaintiffs two days previously ; and also the said orders and authority to Chantler ; and they then demanded the re-delivery of the goods pursuant to the said notice and demand, and the said authority for Chantler to unship the same : to which Fillan then replied, he would not permit the goods to be removed, and gave a positive refusal to re-deliver the same.

The goods in question were at this time so stowed that they could have been got out in three days.

No bill of lading for the said goods was ever signed.

The *Bucephalus* was originally advertised to sail on the 31st of August, 1843, but her time for sailing was from time to time altered by advertisement, until the 23d of September, 1843. She did not leave the West India Export docks until the 29th of September, 1843 ; and continued to load until that day : and ultimately she sailed without a full cargo.

The question for the opinion of the court is, whether, under the circumstances above stated, the plaintiffs are entitled to recover in this action. If the court are of opinion that the plaintiffs are entitled to recover any portion of the goods in question, the verdict is to stand for the plaintiffs for the sum of 394*l.* 6*s.* 2*d.*, and judgment is to be entered up thereon for the plaintiffs. But, if the court are of a contrary opinion, then a verdict is to be entered for the defendant.

The case was argued in Michaelmas term last.

Channell, Serjt., (with whom were Sir *T. Wilde*, Serjt., and *Peacock*.)

for the plaintiffs. Two questions present themselves in this case for the consideration of the court; first, whether, under the circumstances above detailed, the property in the goods was ever divested *out of the plaintiffs; secondly, whether, if once divested, such property was not re-vested in them by the rescission of the contract with Grumbrecht by the subsequent agreement of the 14th of September, 1843. (a) [*343]

1. It appears from the special case that the plaintiffs, on the 20th July, 1843, sold certain goods to the value of 394*l.* 6*s.* 2*d.* to Grumbrecht, for whose account they were to be shipped on board the *Bucephalus* bound for Sydney, and to be paid for before the vessel should leave the port of London. The goods were accordingly put on board the *Bucephalus* by the plaintiffs on the 27th of July, Jenkins, the mate, giving them a receipt for the same: but, before the departure of the vessel, Grumbrecht, the vendee, became insolvent. Under these circumstances, it is submitted that the plaintiffs never did, in fact, part with the possession of the goods. Even a re-sale of the goods by Grumbrecht, and payment to him, would not have destroyed the plaintiffs' right to demand them; *Craven v. Ryder*, 6 Taunt. 433. There is no difference, in substance, between the mate's receipt in this case, and the notes given in *Thompson v. Trail*, 2 C. & P. 334, 6 B. & C. 36, 9 D. & R. 31, where the signature of a bill of lading making the goods deliverable to the consignee was held to be a conversion, the mate's receipt remaining in the hands of the consignor. The only difference between that case and the present is, that there the goods were put on board a general ship, whereas here the ship was *hired for a gross sum for the voyage. [MAULE, J. Lord TEN- TERDEN treated that as a case of stoppage in transitu: now, a right of stoppage in transitu is a right belonging to an unpaid vendor who has parted with his goods.] It is not contended here that the property had not, in some sense, been parted with: but the transitus, at all events, was not at an end. In *Bohtlingk v. Inglis*, 3 East, 381, a trader in England chartered a ship on certain conditions for a voyage to Russia, and to bring goods home from his correspondent there, who accordingly shipped the goods on account and at the risk of the freighter, and sent him the invoices and bills of lading of the cargo; and it was held, that the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee, in case of his insolvency in the mean time before actual delivery, any more than if they had been delivered on board a general ship for the same purpose: and, a demand of the goods having

(a) No notice had been given to the judges of the points intended to be argued: but *Shaw*, Serjt. who appeared for the defendant, intimated that he proposed to argue—

First, that the mere possession by the plaintiffs of the mate's receipt, did not vest the property of the goods in them, so as to enable them to maintain trover.

Secondly, that, the goods having been once put on board, the plaintiffs could not, by rescinding the contract with the vendee, get rid of the contract with the ship-owner to carry the goods to Sydney.

been made by the agent of the consignor upon the captain before they were unloaded, after which he delivered them to the assignees of the vendee, it was held that the consignor might maintain trover against the assignees. So, in *Ruck v. Hatfield*, 5 B. & Ald. 632, where goods were sold "free on board," and upon their shipment the agent of the vendors tendered to the mate (the captain being absent) a receipt by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept, but refused to sign, and on the following day signed bills of lading to the orders of the vendees, it was held that the transitus was not at an end, but that, on the insolvency of the vendees, the vendors were entitled to stop the goods.

*345] *2. By the terms of the charter-party, the ship was demised to Grumbrecht for the voyage: the freight of all goods put on board would be his, he paying the 1600*l.* agreed upon as the hire of the ship; *Newberry v. Colvin*, 4 M. & P. 876, 7 Bingh. 190; *Campion v. Colvin*, 3 Bingh. N. C. 17, 3 Scott, 338; *Belcher v. Capper*, 4 Mann. & Gr. 502, 5 Scott, N. R. 257. The defendant had notice of the rescission of the contract with Grumbrecht on the 5th of September, 1843, and the ship did not sail until the 29th. The goods were twice demanded on the part of the plaintiffs, and on the last occasion the plaintiffs offered to pay the reasonable charges attending the delivery, and any lawful claim the defendant might have thereon.

Shee, Serjt., (with whom was *Crowder*,) for the defendant. Upon the facts stated in the special case, the plaintiffs are clearly not entitled to the possession of the goods, and there has been no conversion by the defendant. [MAULE, J. The question is, whether a man can insist upon taking his own goods out of the ship under such circumstances; for, it can hardly be contended that these goods did not, by the agreement of the 14th of September, re-vest in the plaintiffs.] A delivery on board the *Bucephalus* was a delivery into the warehouse of the vendee. In *Inglis v. Usherwood*, 1 East, 515, it was distinctly held that a delivery by the consignor of goods on board a ship chartered by the consignee, is a delivery to him, and the consignor cannot afterwards stop them in transitu. In considering whether or not the possession of the vessel is taken out of the owner by the terms of a charter-party, it is material to see whose servants the captain and crew are. Here, not only were they the

*346] servants of the owners, but the captain himself *was a part owner. In *Belcher v. Capper*, 4 Mann. & Gr. 502, 5 Scott, N. R. 257, amongst a variety of circumstances tending to show that the owners parted with the possession of the vessel, was a stipulation that the charterer should have power to appoint a master, for whose conduct he was to be answerable; and this was strongly relied on by the court in giving their judgment. Here, by the terms of the charter-party, the owners expressly stipulate to find the captain, officers, and crew in provisions and wages. It is clear, therefore, that they remained the servants of the

owners. It is further provided that all goods landed and taken on board at Sydney shall be, on and from the wharf, at the charterer's expense, and that all goods discharged at Wellington and Auckland shall be landed in the ship's boats, if required, but at the charterer's risk—a stipulation that would have been altogether unnecessary if it had been intended that the charterer should have the entire possession and control of the ship. The fair result of the whole charter is, that it is a mere contract on the part of the owners to carry the goods to their place of destination, but not a demise of the ship so as to constitute the charterer owner *pro hac vice*. And, even if it did operate as a demise of the ship, the owners would still have a lien upon the goods to the extent of the freight or hire of the vessel for which they stipulated with Grumbrecht; *Paul v. Birch*, 2 Atk. 621; *Faith v. The East India Company*, 4 B. & Ald. 630: for, though, by the terms of the contract, the owners intended to waive their lien on the goods, such right revives on the insolvency of the hirer. [TINDAL, C. J. You must go the length of contending, that, when the charterer has once put goods on board, he cannot afterwards change his mind and unship them.] In *Hutton v. Bragg*, 7 Taunt. 14, GIBBS, C. J., in answer *to an argument that no lien could exist, inasmuch as [*347 by the terms of the charter-party a specific sum was to be paid in a specific manner, observed: “With respect to that proposition, it is not true that a lien cannot exist where there is a stipulation for a particular sum to be paid for that which is to be done about goods. I am not prepared to say whether a lien may or may not exist in a case where not only a specific sum, but a specific mode of payment, is stipulated for, as, for example, by bills payable at certain periods.” So, in *Stevenson v. Blacklock*, 1 M. & Sel. 542, it was held that bills given for an attorney's bill of costs being dishonoured, his lien on the client's papers, which subsequently came into his hands, revived. Here, it appears, that, after the goods were shipped, and before the arrival of the day on which the 1600*l.* were to have been paid, Grumbrecht was insolvent, and in custody on a charge of felony: there was no security, therefore, for his ability to perform his engagement; and he stood in very much the same situation as the acceptor of the dishonoured bills in the case last cited. In *Thompson v. Trail*, 2 C. & P. 334, Lord TENTERDEN expressly ruled, that, if the captain, instead of assigning the reason he did for the non-delivery, had said, “the goods are now on board, and I must take them to their destination,” that would have been no conversion. According to all the foreign writers, the goods being once on board, the owners were entitled to retain them as security for the entire freight. Pothier says: (a) “Le troisième cas auquel l'affrèteur doit le fret entier de ses marchandises, quoiqu'elles ne soient pas parvenues jusqu'au lieu de leur destination, c'est lorsque par son fait elles n'y sont pas parvenues. Cela est [*348 conforme aux principes du contrat *de louage, suivant lesquels

(a) Des contrats de Louage Maritime, (Charte-partie,) Part I. § 3, Art. 2, § 4, No. 73.

le loyer est dû, lorsqu'il n'a tenu qu'au locataire de jouir de la chose qui lui a été louée." In Valin's Commentaire sur L'Ordonnance de la Marine, liv. III. tit. I., § 11, the law is thus laid down: "Le navire, ses agrès et appareils, le fret, et les marchandises chargées, seront respectivement affectés aux conventions de la charte-partie.(a) Le batel est obligé à la marchandise, et la marchandise au batel, dit *Cleirac*, sur l'article 21, des jugemens d'*Oleron*, n. 3, pag. 86, et art. 18, tit. *De la Navigation des Rivières*, pag. 597. Le privilège accordé par cet article s'étend respectivement et distributivement, c'est-à-dire, que les marchandises du chargeur affréteur sont affectées spécialement au paiement du fret; *nam et ipsum nautum potentius est*, dit la loi 6, § 1, ff. *qui potiores in pignore*.(b) Mais ce privilège ne donne pas droit au maître de retenir les marchandises dans son navire, faute de paiement du fret: il peut seulement s'opposer à leur transport lors de la décharge, ou les saisir dans les allèges ou gabares, suivant l'article 23, du titre *Du Fret ou Nolis*; et s'il les laisse parvenir à ceux à qui elles sont adressées, il ne perd pas pour cela son privilège; mais l'article 24, du même titre ne le fait subsister que pendant quinzaine, pourvu encore que ces marchandises n'aient pas passé en main tierce." And the same author again says:(c) "Si le vaisseau est chargé à cueillette, ou au quintal, ou au tonneau, le marchand qui voudra retirer ses marchandises avant le départ du vaisseau, pourra les faire décharger, à ses frais, en payant la moitié du fret.(d) C'est ici une grâce accordée au chargeur à cueillette, au quintal, ou au tonneau, de pouvoir retirer, avant le départ du navire, les marchandises qu'il y a chargées en conséquence de la charte-partie, et cela qu'il ait de bonnes raisons pour les

*349] *retirer, ou que ce ne soit qu'un pur changement de volonté par caprice. *Idem*, l'article 11, chap. 9, du *Guidon*, contre la disposition de l'art. 20, des Lois *Rhodiennes*, qui, sans aucune distinction, condamnait au paiement du fret entier le marchand qui retirait ses marchandises du navire, en ces termes: *Si vero mercator eximere merces voluerit, nautum integrum exercitori solvat*; tandis que, faute par lui de charger en exécution de la convention, il en était quitte pour la moitié du fret, ce qui n'est pas plus aisé à concilier que l'inverse de la décision de l'art. 3, ci-dessus, avec celle du présent article." "La raison pour laquelle notre article veut que le marchand soit quitte en payant la moitié du fret seulement, est, sans doute, que le maître peut trouver à remplacer ces marchandises retirées de son navire, et qu'ainsi la moitié du fret qu'il gagne est censée suffire pour le dédommager du retardement que cet événement pourra apporter à son départ: d'où il s'ensuit évidemment que cette moitié du fret lui sera acquise sans retour, quoiqu'il parvienne dans la suite à compléter son chargement; ce qui s'accorde au reste avec ce qui a été dit sur l'art. 3, que le maître ne conservera le fret entier qu'autant qu'il n'aura pas achevé la charge de son navire, en y recevant

(a) Vide Code de Commerce, art. 280.

(c) Liv. III. tit. III. *Du Fret ou Nolis*, § 6.

(b) Dig. lib. 20, tit. 4, l. 6.

(d) Vide Code de Commerce, art. 291.

des marchandises d'ailleurs. Comme notre article ne parle que du cas où le navire est frété à cueillette ou au tonneau, je ne pense point que sa décision soit applicable à l'affrètement d'un navire en entier, c'est-à-dire, que l'affrèteur, soit après avoir commencé de charger, ou avant, puisse renoncer à l'affrètement, et laisser la navire au maître en lui payant la moitié du fret convenu, quoiqu'il semble que le principe de décision soit le même. La raison est que cet article étant extraordinaire, il ne convient pas d'en faire l'application d'un cas à un autre; à quoi il faut ajouter qu'il est tout autrement difficile de trouver un navire à affréter en entier, qu'à l'affréter au tonneau ou à cueillette, *pour une quan- [*350
tité de marchandises qui reste à y charger. De sorte que, dans l'hypothèse de l'affrètement du navire en entier non exécuté de la part de l'affrèteur, j'estime que l'affrèteur est tenu de payer tout le fret convenu, à la déduction toutefois des marchandises que le maître aura introduites dans son navire, il n'importe comment; desquelles marchandises le fret sera réglé à l'amiable ou par experts, pour en être fait raison à l'affrèteur, sans préjudice néanmoins des frais de retardement du maître, s'il est mis en règle pour cela." That very learned author thus distinctly (a) lays it down, that, where the whole ship is let to freight, the freighter shall not take out his goods without payment of the entire freight. [ERLE, J. Is it without paying, or without remaining liable for, the entire freight?] Boulay Paty (b) expressly says: "Dans les affrètemens ordinaires dès qu'une fois l'affrèteur a commencé à charger ses marchandises dans le navire, il ne peut plus les retirer qu'en payant la totalité du fret convenu, si le navire part à non charge." Rogron also, in his note on art. 291 of the Ordinance, says: "L'affrèteur dès qu'il a chargé ses marchandises, ne peut plus les retirer." The word *affectés*, in Valin's Commentary, is explained to mean *affectés par privilège*, in the same sense in which that word is used in article 271: "Le navire et le fret sont spécialement *affectés* aux loyers des matelots." (c) All the cases that have raised the question, *whether or not there had been a demise of the ship so [*351
as to make the charterer the owner *pro hac vice*, presuppose a lien upon the goods put on board for the entire freight, should the charter-party not amount to an absolute demise. Grumbrecht could not rescind his contract with the plaintiffs so as to prejudice the ship-owners.

Channell, Serjt., in reply. By unshipping the goods, the charterer would not be guilty of any infraction of his contract with the ship-owners.

(a) Cours de Droit Commercial, vol. II. tit. 8, § 6.

(b) Vide tamen, antè, 349.

(c) Notwithstanding the observations of Sir W. Grant, M. R., in *Gladstone v. Birley*, 2 Merivale, 401, on the clause in our English charter-parties, by which the merchant "binds the cargo to be laden," that clause appears to be conformable to the principle of the maritime law, and to apply to a case like this. In *Birley v. Gladstone*, 3 M. & S. 205, it was decided that the ship-owner had no lien on goods carried to their destination in respect of the freight of other goods re-landed at the loading port. In the principal case, however, the refusal was founded upon the right to detain the goods themselves, and carry them to their original destination, unless the stipulated freight was paid.

He was under no contract to put any goods on board their vessel; all he engaged to do was, to pay a given sum at a day not then arrived. The authorities relied on for the defendant are cases in which the freight was actually earned. Here, however, no freight whatever was due. Grumbrecht, the charterer, had shipped his own goods on board his own vessel; and he had an undoubted right to take them out again. The observation attributed to Lord TENTERDEN in *Thompson v. Trail*, 2 C. & P. 334, if entitled to any weight in itself, is not applicable here. That was the case of a general ship; and the defendant, by signing bills of lading to third persons, altered the destination of the goods.

Cir. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

This was an action of trover and conversion of a certain quantity of lead. The first plea denied the wrongful conversion by the defendant, and the second the possession of the plaintiffs.

The material facts appear to be, that, on the 3d of June, 1843, one Grumbrecht chartered the ship *Bucephalus*, of which the defendant was *352] master and part owner, for a voyage from London to Sydney, and, if required by him or his agent, to Wellington, in New Zealand; the ship to clear from the Custom-house, and sail from London on or before the 31st of August, wind and weather permitting; and, in consideration thereof, the charterer to pay to the broker of the ship-owners 1600*l.*, in London, two months after the ship cleared at the Custom-house. On the 20th of July, the charterer bought of the plaintiffs the goods in question, to be shipped, on his own account, on board the *Bucephalus*, and to be paid for before the ship left the port of London. On the 27th of July, the plaintiffs shipped the goods accordingly, and took the mate's receipt for goods shipped on their own account; which receipt they still retain. On or about the 29th of August, Grumbrecht became insolvent, and unable to pay for the goods; and on the 1st of September, the plaintiffs demanded, by a notice in writing, the re-delivery of the goods from the defendant, offering at the same time to pay all reasonable charges attending such re-delivery; which was refused by the defendant, on the ground that, the goods having been shipped for the voyage stated in the charter, it was his duty to convey, and he could not avoid conveying, them on such voyage. On the 14th of September, Grumbrecht agreed with the plaintiffs to rescind his contract of purchase with the plaintiffs, and to give up all his interest in the goods to them; and signed an order to the defendant to deliver the goods to the plaintiffs; and the plaintiffs again demanded them from the defendant, offering to pay the reasonable charges, and every lawful claim; but the defendant again refused to redeliver, and afterwards carried the goods away on the voyage.

Upon this state of facts, we think, as to the last question,—the right to the possession,—that such right was in the plaintiffs at the time of the

conversion: for, *the property was originally in them; and, [•353
 assuming that it passed from them to Grumbrecht by the shipment
 on board the *Bucephalus* on the 27th of July in the manner above stated,
 yet, as Grumbrecht had neither become bankrupt nor taken the benefit of
 the insolvent act, but continued *sui juris* up to the time of making the
 agreement of the 14th of September, we think, that, by the operation
 of that agreement, and of the order by Grumbrecht on the defendant to
 deliver the goods, the property in those goods revested in the plaintiffs,
 either in their original right as vendors, or in a new right derived from
 the assignment of the vendee. And it becomes, therefore, unnecessary
 to decide whether the plaintiffs derived a right from retaining the mate's
 receipt, and demanding the goods on the 1st of September; upon which
 point, some of the argument before us has turned.

Upon the other point, we think the refusal by the defendant upon the
 ground stated by him, to redeliver the goods, after the demand by the
 plaintiffs on the 14th of September, and the offer then made of the pay-
 ment of the reasonable charges and all lawful claims, was a wrongful
 conversion; for, whatever power Grumbrecht himself had over the dis-
 position of these goods before the agreement of the 14th of September,
 we think the plaintiffs, after such agreement, had the same: and we see
 nothing in the terms of this charter-party which could in any way restrain
 Grumbrecht from dealing with the cargo as he thought proper. He had
 the entire use of the ship under the charter; and there was nothing to
 prevent him from taking out the cargo before the ship sailed, if circum-
 stances had rendered it expedient, and changing such cargo for another;
 or even from sending the ship empty to Sydney; or from loading her
 entirely with goods of other persons, the freight of which had been paid
 to him in advance; there being no agreement on his part to put a full
 *cargo, or indeed any cargo, on board; and the payment for the [•354
 hire of the ship being made quite independent of the delivery of
 any cargo.

No question arises as to any lien of the defendant on this cargo, for
 freight: for, as the sum stipulated to be paid is not made payable until
 two months after the ship had cleared from the Custom-house, there
 could be no lien for freight not then due; and consequently it becomes
 unnecessary to decide whether in this case the possession of the ship was
 altogether parted with by the ship-owners to the charterer, according to
 the doctrine laid down in *Hutton v. Bragg*, 7 Taunt. 14.

But it was contended, on the part of the defendant, that, under the
 authority of *Thompson v. Trail*, 2 C. & P. 334, the goods having been
 put on board to be carried to Sydney, the defendant had the right to insist
 upon their being taken on that voyage. In that case, indeed, ABBOTT,
 C. J., is reported to have said that, if the captain, when the goods were
 demanded of him, had answered, "I cannot give them up; the goods
 were put on board, and I must take them to Leghorn," he, the Chief

Justice, should have held there was no conversion. But, upon this dictum, it is to be observed, that the cause was not decided on this ground; that it was no more than an opinion given on a point not then before him, but used rather by way of illustration than deliberate judgment; and, further, although such opinion may be perfectly correct with reference to the facts of that case, yet such facts were materially different from those of the case before us. The goods in that case were in a general(*a*) ship, not, as here, in a ship chartered by the owner of the goods: there was no tender of the freight, which in that case had begun to be earned, or

*355] of any compensation for the trouble of getting the goods from the hold: and lastly, the ground of the captain's refusal was, that he had signed a bill of lading to a different person. We cannot think, therefore, the authority of that case in any way applies itself to the present. And as to the foreign authorities cited, they are not, in reality, opposed to the construction we have put upon the contract. They amount, in effect, only to the proposition, that the freight stipulated for is still payable, notwithstanding the goods are not carried on the voyage by reason of some act of the charterer himself, which prevents their being so carried. And there can be no doubt in the present case, but that the gross sum of 1600*l.*, which was stipulated to be paid for the use of the ship on the voyage, would have been still recoverable by the ship-owners under the agreement, although the charterer had taken the goods out of the ship, and she had gone empty on her voyage. But this doctrine does not militate against the right of the charterer to take his goods out of the ship, at all events before the stipulated sum became due.

Upon these grounds, we think the verdict for the plaintiffs on both these pleas ought to stand; and it will stand for the sum of 374*l.* 6*s.* 2*d.*, the amount agreed on between the parties.

Rule accordingly.(*a*)

(*a*) By the Spanish Commercial Code of 1829, which has the reputation of being the best in Europe—"Every person who embarks goods in a general ship (*En los fletamentos de carga general*) may unload the goods shipped, paying half freight, the expense of loading and unloading, and all damage to the other shippers. The latter to be at liberty to oppose the unloading, taking the goods upon themselves and paying the invoice price." *Código de Comercio*, Art. 765.

*356] *Sir BURGESS CAMAC, Knight, v. WARRINER. Feb. 6.

In April and July, 1843, B. purchased of A. a certain material called oropholithe, of which A. was the patentee. The portion purchased in April was described in the invoice as "roofing," and was put on a building belonging to B. by A.'s workmen. That supplied in July was described as "material," and was put on by B.'s workmen. There had been a previous purchase in October, 1842, which had been described as "flooring," and was so applied, and as to which money was paid into court. In an action upon a bill of exchange given by B. in payment of the above goods, B. pleaded that he accepted the bill in consideration of goods called Oropholithe, which A. had warranted "fit for the roofing of buildings," but which proved to be useless. At the trial B. proved, that, in September, 1843, his agent had a conversation with A.'s agent about roofing certain premises he was building with the patent article; on which occasion the latter gave the former a prospectus, which described it as fit for external roofing. The judge ruled that there was no evidence to be left to the jury in

support of the plea :—*Held*, that the direction was right, inasmuch as there was no evidence to show that the contract for the goods subsequently supplied was made with reference to the treaty for roofing, which took place in September, 1842; or, at all events, nothing to show that the “material” sold in July, 1843, was sold for roofing rather than flooring; and that the plea failing as to part, failed altogether.

ASSUMPSIT. The first count was upon a bill of exchange for 25*l.* 11*s.*, alleged to have been drawn by the plaintiff, by and under the name, style, and firm of the Oropholithe Company, on the 18th of October, 1843, upon and accepted by the defendant, payable to the company or order three months after date. There were also counts for goods sold and delivered, and upon an account stated.

The defendant pleaded, first, as to so much of the cause of action in the first count mentioned as related to 23*l.* 17*s.*, parcel of the sum of 25*l.* 11*s.* in the first count mentioned, that the plaintiff drew and the defendant accepted the bill in that count mentioned in consideration of and for and on account of certain goods and chattels called oropholithe,^(a) theretofore furnished by the plaintiff to him the defendant under a representation and warranty by the plaintiff, at the time of such furnishing, made to the defendant, that so much of the *said goods and [*357 chattels as amounted in price to 23*l.* 17*s.* were fit and proper materials for the external roofing of buildings, and suitable for such purpose, and for no other consideration whatever; and the defendant then accepted and purchased so much of the said goods and chattels as last mentioned for the purpose of roofing certain external buildings, trusting in the said representation and warranty of the plaintiff; all which the plaintiff then well knew. Averment, that so much of the said goods and chattels as last mentioned were not fit and proper for roofing external buildings, or suitable for the same, but were altogether unfit and improper and unsuitable for that purpose, and always had been and were altogether useless to the defendant—verification. Second plea, payment into court of 1*l.* 14*s.*

To the first plea the plaintiff replied *de injuriâ*. Upon the second plea he took the 1*l.* 14*s.* out of court in satisfaction of the causes of action as to that sum.

The particulars of the plaintiff's claim appeared by the bill of parcels, which was as follows:—

	£	s.	d.
1842, Oct. 3. To flooring in Cornhill, 11 $\frac{1}{2}$ sq. yards, at 3 <i>s.</i>	1	14	0
1843, April 1. To roofing at Erith, 30 $\frac{1}{2}$, at 3 <i>s.</i> - - -	4	12	4
“ “ “ 12 $\frac{1}{2}$, at 3 <i>s.</i> - - -	1	18	8
Expenses on ditto - - -	1	1	0
July 9. To materials, 129 sq. yards at 2 <i>s.</i> 7 <i>d.</i> -	16	13	3
Cartage - - -	0	5	0
	26	4	3
Less 2 $\frac{1}{4}$ per cent. for cash -	0	13	3
	£25	11	0

(a) Roof-stops.

The cause was tried before PATTESON, J., at the last spring assizes for Suffolk. The facts that appeared in evidence were as follow:—The defendant, the proprietor of the George and Vulture tavern, in Cornhill, in the year 1842 built a hotel at Erith in Ken', now known by the name of the Pier Hotel. In September in that year, one Hiscocks, an architect
 *358] employed by the *defendant to superintend the erection of the Pier Hotel, had an interview with Noakes, the secretary of the Oropholithe Company, respecting the application of the patent article to the roofs of the hotel; upon which occasion Noakes handed to Hiscocks a printed prospectus, detailing the advantages of the oropholithe over other materials usually employed for external roofing.

This prospectus contained the following passages:—

“The invention will be found to recommend itself to attention by its cheapness and durability, as well as by the absence of all qualities capable of attracting electric matter, and which are more or less resident in all metallic substances. This cannot fail to render it safer than either of the metals now used on the tops of houses; while, not being liable to oxidation, and entirely impenetrable(a) to water, it must on both these accounts recommend itself to the attention of builders with additional force.

“Independently of its durable qualities, for cheapness the oropholithe will be found unrivalled. It can be laid down at half the price of zinc, and one quarter of that of lead, and, from the immense saving in the expenditure of time and money, at considerably less than slates and tiles. Then, its weight being so much less than any of these materials, the saving of timber in rafters will not be the least important consideration with the architect, as, while the new-invented material effectually resists the action of the elements, when the amount of pressure taken from the roof is considered, the whole understructure may be much lighter.”

On the 14th of September, 1842, Hiscocks, at the request of the defendant, sent Noakes the superficial contents of the roofs of the Pier
 *359] Hotel, and requested *him to furnish an estimate of the expense of covering them with the oropholithe.

Noakes, on the same day, replied as follows:—

“Sir—We beg to inform you that we should be happy to undertake the covering of the roof of the hotel at Erith, of the dimensions as named in your favour of to-day, complete as slating, including all expenses of cartage, travelling, &c., for 32*l.* 10*s.*, payable at three months, or allowing 2½ per cent. for present cash.

“The Oropholithe Company,
 “Per R. F. NOAKES.”

On the 3d of October following, some flooring of the patent article was laid in the defendant's house in Cornhill, which formed the first item in the bill of parcels, and in respect of which, the sum of 1*l.* 14*s.* was paid into court.

(a) Grammatically “not being entirely impenetrable.”

Nothing further was done until the 1st of April, 1843, when a part of the roof of the hotel at Erith was covered with the oropholithe by the plaintiff's own workmen: the charge for this constituted the next three items in the particulars. And on the 9th of July, a further supply of the "material" took place, which was put down by the *defendant's* workmen. Shortly after the oropholithe was laid down, it was found to be wholly useless for the purpose to which it was applied.

On the part of the plaintiff it was insisted that the plea was not made out; first, because there was no evidence to show that the goods were sold in April and July, 1843, pursuant to the supposed warranty arising out of the communication between the secretary of the company and the defendant's agent in September, 1842; secondly, because the order was for the specific article supplied, and consequently no warranty could be implied; and *Chanter v. Hopkins*, 4 M. & W. 399, was cited.

*The learned judge ruled that there was no evidence to be left to the jury in support of the plea, and accordingly directed the jury to find for the plaintiff, for 23*l.* 17*s.*; which was done. [*360]

Channell, Serjt., in Easter term last, obtained a rule nisi for a new trial, on the ground of misdirection. There was ample evidence of warranty, the article supplied being a manufactured article, and the manufacturer knowing the purpose for which it was ordered, and therefore being answerable for its reasonable fitness for that purpose: *Jones v. Bright*, 5 Bingh. 533, 3 Moo. & P. 155; *Brown v. Edgington*, 2 Mann. & Gr. 279, 2 Scott, N. R. 496; *Shepherd v. Pybus*, 3 Mann. & Gr. 868, 4 Scott, N. R. 434; *Oliphant v. Bayley*, 1 D. & Meriv. 373. [CRESSWELL, J., cited *Gray v. Cox*, 4 B. & C. 108, 6 D. & R. 200, 1 C. & P. 184.]

Byles, Serjt. (with whom was *Barlow*.) in Michaelmas term last showed cause. The exhibition of the prospectus to the defendant's agent in September, 1842, created no warranty of the article supplied in the months of April and July in the following year. As to the last supply, there was no evidence to show that the plaintiff or his agent knew the purpose to which the defendant intended to apply it. It was not described in the invoice as "roofing," but as "material." And even assuming that the plaintiff did know the purpose for which the material was ordered, still, according to the doctrine laid down by the court of Exchequer in *Chanter v. Hopkins*, 4 M. & W. 399, no implied warranty that it was fit and proper for that purpose could be engrafted upon the contract, the order being for the supply of an ascertained "commodity. In that case the defendant sent to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following written order:—"Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace: patent right, 15*l.* 15*s.*; iron-work not to exceed 5*l.* 5*s.*; engineer's time fixing 7*s.* 6*d.* per day." The plaintiff accordingly put up on the defendant's premises, one of his patent furnaces; but it was found not to be of any

use for the purposes of a brewery, and was returned to the plaintiff: and it was held, (no fraud being imputed to the plaintiff,) that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole 15*l.* 15*s.*, the price of the patent right. In the course of the argument, PARKE, B., observed: "The difference between this case and that of *Jones v. Bright*, 5 Bingh. 533, 3 Moo. & P. 155, is, that here the subject of the contract is defined, and defined accurately by the buyer. *The object for which he wanted it is immaterial.*" And, in delivering his judgment, the same learned judge says: "I agree with the authority which Mr. Byles has referred to, of *Jones v. Bright*, that, if an order is given for an *undescribed and unascertained* thing, stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price, unless it does answer the purpose for which it was supplied." [MAULE, J. In the present case, the learned judge ruled that there was *no* evidence of warranty to go to the jury.] It is not necessary to sustain the integrity of that *362] direction: the plaintiff may support his *verdict upon any ground upon which it is capable of being supported. [MAULE, J. It can hardly be contended that the verdict is right, if the direction of the judge was erroneous.] The present case falls exactly within an observation of Lord ABINGER in *Chanter v. Hopkins*, 4 M. & W. 399: "The case," said his lordship, "is that of an order for the purchase of a specific chattel, which the buyer himself describes, believing, indeed, that it will answer a particular purpose to which he means to put it; but, if it does not, he is not the less, on that account, bound to pay for it. The seller does not know it will not suit his purpose, and the contract is complied with in its terms." Here, the contract was for the supply of a patent article, a thing well ascertained, and known to the defendant, who had already used it. In *Brown v. Edgington*, 2 Mann. & Gr. 279, 2 Scott, N. R. 496, the buyer did not get the article he bargained for. The case of *Oliphant v. Bayley*, 1 D. & Meriv. 373, is precisely in point. It was there held, that, where B. orders of A. a machine, previously known and ascertained, for which A. had a patent, it is no answer to an action for the price, that the machine did not answer the purpose specified in the patent, although it be not shown that the defendant had had previous opportunities of exercising his judgment as to the usefulness of the machine. In giving the judgment of the court, upon a motion for a new trial, on the ground of misdirection, Lord DENMAN said: "We have referred to the learned judge who tried the cause, and to whose direction an objection was taken. That direction was, that if the patent two-coloured printing-machine was a known and ascertained article, the defendant, having ordered one, must pay for it, whether it answered his purpose or not; but that, if it was not a known and *ascertained

article, and the defendant ordered a machine for printing two colours, and the plaintiff undertook to supply it, he could not recover the price unless the machine was reasonably fit for the purpose for which it was ordered: *Chanter v. Hopkins*. With respect to the apparatus connected with the machine, the learned judge left it to the jury to say whether it was constructed according to the defendant's directions, and whether it was reasonably fit for the purpose for which it was ordered. The jury found these questions in favour of the plaintiff. We are of opinion that the direction of the learned judge was correct, and the verdict right."

[TINDAL, C. J. The very name of the article (a) here indicates that it is fit and proper for covering roofs.] The identification of the article by the previous user entirely destroys the notion of implied warranty, even assuming that the representation alleged to have been made in September, 1842, can fairly be drawn down and applied to the periods at which the supplies in question took place. [TINDAL, C. J. It could scarcely be necessary that the warranty, if any there were, should be repeated on each occasion. Your contention will be, that that which the defendant calls a warranty is but *simplex commendatio*, which, as the civil law has it, *non obligat*.] Precisely so. The third supply, at all events, is free from difficulty: as to that, there is nothing to show that the plaintiff knew the purpose to which it was to be applied, and consequently no warranty can arise out of that transaction. Then, assuming that there was a warranty, and a breach of it, that clearly affords no answer to an action upon a bill of exchange given for the price, unless the article is proved to have been utterly useless, as alleged in the latter part of the first plea. [MAULE, J. Is not that a question for the jury? *There having been a breach of warranty, and no default in the defendant, the consideration [*364 fails.] There can be no failure of consideration, if the goods were of any value, or useful for any purpose, the plaintiff not being aware of the precise purpose to which they were intended to be applied, and having been guilty of no fraud; *Morgan v. Richardson*, 1 Campb. 40, n.; *Moggridge v. Jones*, 14 East, 486, 3 Campb. 38; *Solomon v. Turner*, 1 Stark. N. P. C. 51; *Lewis v. Cosgrave*, 2 Taunt. 2; *Trickey v. Larne*, 6 M. & W. 278.

Channell, Serjt., (with whom was *Gunning*,) in support of the rule. The first supply at Erith was for roofing, and was put on by the plaintiff's own workmen; and, though the article subsequently furnished is described in the invoice as "material," it was the same patent article; and there was abundant evidence that the plaintiff knew it was intended to be applied to the same purpose. The cases clearly establish, that if a manufacturer supply goods with knowledge of the purpose for which they are to be used, he impliedly warrants them fit and proper for that purpose: *Gray v. Cox*, 4 B. & C. 108, 6 D. & R. 200, 1 C. & P. 187; *Brown v. Edgington*, 2 Mann. & Gr. 279, 2 Scott, N. R. 496; *Shepherd*

(a) Orophelitic—roof-stone.

v. *Pybus*, 3 Mann. & Gr. 878, 4 Scott, N. R. 434. In *Brown v. Edgington*, TINDAL, C. J., said: "If a man purchase goods of a tradesman without in any way relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but, if the tradesman be informed, at the time the order is given, of the purpose for which the article is wanted, the buyer relying upon the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is *365] "required." And that doctrine is sanctioned by the subsequent case of *Shepherd v. Pybus*. There, the defendant sold to the plaintiff a barge, which had been built by the defendant, and was then lying alongside his wharf (where the plaintiff had seen her) not completely rigged; and it was held, that a warranty was implied that the barge was reasonably fit for use; and that, although the contract was in writing, evidence was admissible to show, that, in consequence of the defective construction of the barge, certain cement, which the plaintiff was conveying therein, was damaged, and the plaintiff incurred expense in rendering her fit for the purpose of his trade, a purpose to which the defendant knew, at the time of the contract, she was intended to be applied. The case of *Chanter v. Hopkins* is clearly distinguishable from the present. There, the order was expressly given for the plaintiff's patent apparatus; the article contracted for was supplied; and there clearly was no implied warranty on the part of the patentee that it was fit for the purpose to which the defendant meant to apply it. So, *Oliphant v. Bayley* was the case of a patent machine supplied to order. Here, however, there is no standard to which appeal can be made, as in those two cases. [ERLE, J. Oropholithe is quite as definite as the articles in *Chanter v. Hopkins*, and *Oliphant v. Bayley*. The reasoning of the court of Exchequer in the former case would have been equally applicable, had the order been for Morrison's pills.] The order was for properly manufactured oropholithe: the plaintiff undertakes to supply genuine oropholithe, that shall be reasonably fit and proper for the purpose to which the article is applicable; like the copper sheathing in *Jones v. Bright*, 5 Bingh. 533, 3 Moo. & P. 155. [ERLE, J. How do you affect the contracts made in April and July, 1843, *366] with the supposed warranty in "the month of September preceding? The conversation between the plaintiff and the defendant's architect at that time, when the prospectus was shown, resulted in nothing. It seems to me to fall within the principle which excludes all preliminary talk about a contract.] If the supply had taken place at that time, it is clear there would have been an implied warranty; and the subsequent supplies must necessarily draw down to them the same implied warranty. At all events, it was evidence that ought to have been submitted to the jury. The cases of *Morgan v. Richardson*, 1 Campb. 40, n.; *Moggridge v. Jones*, 14 East, 486, 3 Campb. 38; *Solomon v. Turner*, 1 Stark. N. P. C. 51; *Lewis v. Cosgrave*, 2 Taunt. 2; and *Trickey v.*

Larne, 6 M. & W. 278, amount to no more than this—that a *partial* failure of consideration is no answer to an action upon a bill of exchange or promissory note. If the defendant has received *some* consideration, he must resort to his remedy by cross action; but, if he has received *no* benefit at all from the contract, if there has been a total failure of consideration, in that case he may urge it as a defence to the action, seeing that, if he resorted to a cross action, he must recover precisely the same amount of damages. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

In this case, in answer to a declaration by the drawer and payee against the acceptor of a bill of exchange for 25*l.* 11*s.*, the defendant paid 1*l.* 14*s.* into court, and pleaded, as to 23*l.* 17*s.* parcel, &c., that the defendant accepted the bill in consideration of goods called oropholithe, which the plaintiff had warranted “fit for roofing of buildings,” but which were not so; and to which the “plaintiff replied *de injuria*,” [*367 &c., and had the verdict, on the direction of the learned judge that there was no evidence to be left to the jury in support of the plea. The defendant obtained a rule to show cause why the verdict should not be set aside, and for a new trial, on the ground of misdirection: and, after cause shown, we are of opinion that the direction of the learned judge was right.

The contract for the goods in question is not shown to have been made with any reference whatever to the treaty for roofing which took place in September, 1842, proved by the witness Hiscocks, or to the prospectus which had been delivered to the same witness. Of the goods in question, one parcel, to the value of 7*l.*, was delivered in April, 1843, and is described in the bill of parcels delivered by the plaintiff, as “roofing:” and the other parcel, to the value of 16*l.* 18*s.* 3*d.*, was delivered in July, 1843, and is described in the same bill as “material.” There was no other evidence in the contract for the goods in question except this bill, which contained one other item, for goods delivered in October, 1842, and therein described as “flooring.” The word “material” does not express a warranty of fitness for *roofing* of buildings: and, even if a warranty of fitness for *any* purpose can be supposed to be expressed either by “flooring” or “roofing,” and the word “material” refers to what was sold before, still the evidence falls short of the point to be proved, as there is nothing to show that the “material” was sold for *roofing* rather than *flooring*.

The plea, therefore, is without any proof as to 16*l.* 18*s.* 3*d.*, part of the sum to which it is pleaded, and consequently it fails altogether; and the rule for a new trial must be discharged. *Rule discharged.*

knowing the premises, but contriving, &c., after the making of the last-mentioned indenture, and within the term of fourteen years in the said letters patent mentioned, to wit, on the 2d of May, 1843, and on divers other days and times between that day and the commencement of the suit, and within that part of the said United Kingdom called England, unlawfully and unjustly, without the leave, license, consent, or agreement of the plaintiff, in writing under his hand and seal, or otherwise, for that purpose had and obtained, and against the will of the plaintiff, *did make, use, exercise, and vend the said invention*, in breach of the said letters patent, and against the privileges so thereby granted as aforesaid; and also, on the several and respective days and times last aforesaid, within that part of the said United Kingdom called England, unlawfully and unjustly, without the leave, license, consent, or agreement of the plaintiff in writing under his hand and seal for that purpose first had and obtained, and against the will of the plaintiff, *did make, use, and put in practice the said invention*, in breach of the said letters patent, &c.; and also, on the several and respective days and times aforesaid, within that part of the United Kingdom called England, unlawfully, wrongfully, and unjustly, without the leave, &c., of the plaintiff under his hand and seal for that purpose first had and obtained, and against the will of the plaintiff, *did make, use, and put in practice a part of the said invention*, in breach of the

*372] said letters patent, &c.; and also, to wit, *on, &c., in England aforesaid, wrongfully and unjustly, without the leave, &c., of the plaintiff under his hand and seal for that purpose first had and obtained, and against the will of the plaintiff, *did counterfeit, imitate, and resemble the said invention*, in breach of the said letters patent, &c.; and also, to wit, on, &c. aforesaid, within England aforesaid, unlawfully and unjustly, without the leave, &c., of the plaintiff in writing under his hand and seal in that behalf first had and obtained, did make, and cause to be made, divers additions to the said invention and subtractions from the same, whereby they did pretend themselves to be the inventors and devisors of the said invention, in breach of the said letters patent, and against the privileges so thereby granted as aforesaid; and that, by means of the committing of the said several grievances by the defendants as aforesaid, the plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits which he might, and otherwise would, have derived from the said invention and letters patent, and in respect whereof he had been and was entitled to such privileges as aforesaid, and had been and was otherwise damnified, &c.

The defendants pleaded, seventhly, that Thornton did not particularly describe and ascertain the nature of the alleged invention, and in what manner the same was to be performed, according to the meaning of the said letters patent: concluding with a verification.

Special demurrer; assigning for causes—that the plea was informal and insufficient, in this, to wit, that it neither traversed nor confessed and

avoided any material averment of the declaration—that it was ambiguous, uncertain, and informal, in this, to wit, that, whereas the plaintiff did in his declaration distinctly aver that Thornton did, after the making of the said letters patent, and within six calendar months next after the date of the same letters patent, to wit, on the 21st of June, *1842, by an instrument in writing under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be, and might be, performed, it was uncertain whether by that plea the defendants intended to traverse the said averment in the declaration, or to confess and avoid the same by force and virtue of some new matter; that, if the former, then the plea ought to have concluded to the country, and not with a verification; that, if the latter, then the defendants should have set out in the plea such new matter by force and virtue whereof they sought to avoid the said averment in the declaration—that the plea was informal and insufficient, in this, that it tended to raise a question of law as to the sufficiency of the specification or instrument in writing in the declaration alleged to have been enrolled, and yet did not set out the said specification, or any part thereof, whereas the defendants ought in that plea to have set out the said specification, in order that the court might be able to judge of the sufficiency or insufficiency thereof—that the plea tended to delay and to unnecessary prolixity in the pleadings, in this, to wit, that, inasmuch as the above-mentioned averment in the declaration was material and traversable, the defendants ought, if they intended to maintain the contrary thereof, to have duly and properly traversed the same, and not to have pleaded the contrary thereof in the form of, and pretending the same to be, new matter—that the plea was informal, in this, that it ought to have concluded to the country, and not with a verification—that the plea was uncertain, informal, and insufficient, in this, that it was a circuitous and argumentative traverse of a material allegation in the declaration, and also in this, that it did not state with sufficient or any certainty whether the instrument in writing alleged in the declaration to have been enrolled was admitted or denied to be a sufficient *compliance with the proviso, and also in this, that it did not state with sufficient or any certainty whether the instrument in writing by which the plaintiff alleged that Thornton did particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, was admitted or denied to have been enrolled as alleged—that it did not appear by the plea that there was any proviso or condition in the letters patent whereby it was required that Thornton should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed—that it did not appear with sufficient or any certainty in and by the plea what was the meaning of the letters patent—that the plea was a circuitous and argumentative traverse of the compliance with the con-

ation— whether the averment in the declaration, which that plea does in terms deny, was a material averment on the part of the plaintiff; for, if material, it follows, from the ordinary rules of pleading, that, as the plea distinctly denies it, there could be no other issue raised by compelling *378] the plaintiff to plead *over, and consequently the defendants were bound to conclude their traverse to the country. And we are of opinion that the averment in the declaration is material.

The first objection taken was, that the proviso or condition contained in the letters patent is a condition subsequent only; that the plaintiff has no necessity to allege performance of it; and that the allegation of non-performance must come properly from the other side. But the obvious meaning of this condition appears to us to be, that, if the grantee of the letters patent lets the six months elapse without enrolling the specification, the letters patent shall cease, determine, and become void, if not from the date of the letters patent, at least from the expiration of the six months. But this point has been already settled and determined by the court in the case of *Muntz v. Foster*.

It was secondly objected by the defendants, that, as it does not appear on the face of the declaration that the six months allowed for enrolling the specification had actually expired before the action was brought, so there could be no necessity for the averment that such specification had been enrolled. But we think it is a sufficient answer to this observation, that, if this averment were omitted, the plaintiff's right to sue as an assignee of the patent would be left in doubt and uncertainty; inasmuch as it would neither appear that the six months had elapsed, and the specification had been actually enrolled, nor that the action was brought for a breach of the privilege granted, within the six months next following the date of the letters patent. The declaration in that case might have been held bad, for uncertainty; and we therefore think an averment which prevents that consequence cannot be considered as immaterial.

It was lastly argued, that the conclusion of the plea with a verification was proper in this case: inasmuch as the traverse is larger than the allegation in the declaration, namely, that it contains a denial that the plaintiff *379] *ever did at any time particularly describe the invention, not being pleaded with a *modo ac formâ*, so as to meet the particular averment in the declaration. But to this it appears an answer, that it is alleged in the plea that the grantee of the letters patent did not particularly describe and ascertain the nature of his invention "according to the meaning of the said letters patent;" and, upon referring to the declaration, it appears that a specification is therein alleged to have been filed, which is, upon the face of it, according to the meaning of the said letters patent; so that, in substance, the plea is the same as if it had denied the averment *modo ac formâ*.

We therefore think that the plea concludes improperly to the court, and that the judgment must be for the plaintiff. Judgment for the plaintiff.

LUNN v. THORNTON. Feb. 6.

A grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein.

TAOVER, for bread, flour, household furniture, &c. The defendant pleaded, as to all except the bread and flour, first, not guilty; secondly, not possessed, and thirdly, leave and license; and, as to the excepted articles, fourthly, payment into court of 5s.

The cause was tried before PATTESON, J., at the last spring assizes for the county of Bucks.

By a deed-poll bearing date the 4th of August, 1843, it was witnessed that the plaintiff, who had carried on the business of a baker at Stoney-Stratford, in consideration of 112*l.* 11*s.* 6*d.*, lent to him by the defendant, a mealman, bargained, sold, and *delivered* unto the defendant "all and singular his goods, household furniture, plate, linen, china, stock and implements in trade, and other effects whatsoever, then remaining and being, or *which should at any time thereafter remain and be* [**380* *in, upon, or about his dwelling-house at Stoney-Stratford aforesaid, and also all other his effects elsewhere;*" and that the defendant, in the month of October following, under colour of this assignment, seized all the goods then upon the premises, and, amongst them, certain goods which were not upon the premises or in the plaintiff's possession at the time of the execution of the deed-poll, but were goods acquired by the plaintiff afterwards, and were upon the premises at the time of the seizure.

On the part of the defendant it was contended that the bill of sale covered all goods of the grantor that might be upon the premises at the time of the seizure, whether there at the time of the execution of the bill of sale or not. For the plaintiff, it was insisted that the grant could only operate upon goods which he had actually or potentially at the time the grant was made.

Under the direction of the learned judge, the jury found for the plaintiff on the first and third issues, and for the defendant on the second and fourth; leave being reserved to the plaintiff to move to enter a verdict on the second issue, with 5*l.* damages, the estimated value of the goods seized that were not in his possession at the time of the execution of the bill of sale, in the event of the court being of opinion that the bill of sale did not justify the seizure of those goods.

Byles, Serjt., in Easter term last, accordingly obtained a rule nisi. He submitted that the bill of sale could not operate to convey to the defendant goods of which the grantor was not, at the time of executing it, possessed, actually or potentially: citing 14 *Viner's Abridgment*, tit. *Grants*, p. 50; *Sheppard's Touchstone*, tit. *Grant*, p. 241; *Perkins*, §§ 65, 90 and *Grantham v. Hawley*, Hobart, 132.

*381] **Channell*, Serjt., (with whom was *Gunning*.) in *Trinity term* showed cause. The words of the bill of sale are large enough to convey after-acquired property; and it evidently was not the intention of the parties that the security should be limited to property in the plaintiff's possession at the time of its execution. A bill of sale of goods, made for a valuable consideration, though unaccompanied with the possession, is valid as against the vendor, and also as against a creditor with whose knowledge and assent it was given: *Steel v. Brown*, 1 Taunt. 381. In *Irons v. Smallpiece*, 2 B. & Ald. 551, it was held, upon the authority of *Bunn v. Markham*, 2 Marsh. 532, that a verbal gift of a chattel, without actual delivery, does not pass the property to the donee. *ABBOTT*, C. J., there said: "By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." (a) Here, one of those requisites is complied with, the conveyance being by deed; in which case delivery is not necessary. [MAULE, J. I have always thought Lord *382] TENTERDEN's opinion in *Irons v. Smallpiece* "very remarkable: he speaks of a "deed or instrument of gift," leaving it to be inferred that the assignment might be otherwise than by deed.] There are many cases of sales in which delivery is dispensed with; that of a ship at sea, for instance: *Atkinson v. Making*, 2 T. R. 462. In a case which will probably be relied on by the other side, *Tapfield v. Hillman*, 6 Mann. & Gr. 245, 6 Scott, N. R. 967, the plaintiff, a publican, assigned by way of mortgage, "all and singular the household furniture, plate, &c., stock in trade, goods, chattels, and effects of him the mortgagor, in, upon, about, or belonging to all that inn, &c., and also the tap, yard, stables, buildings, and premises adjoining or belonging thereto, as the same then were in the tenure or occupation of the mortgagor," &c.; and the clause of re-entry empowered the mortgagees, in case of default, "to take, possess, hold, and enjoy all and every the goods, chattels, effects, and premises, to and for their own absolute use and benefit." It was held that by this deed only the property and effects that were upon the premises at the time of its execution passed: but the court threw out an intimation of opinion that the deed might have been so framed as to pass after-acquired property.

(a) With respect to *donationes inter vivos*, gifts by parol are revocable and incomplete, until acceptance (i. e. acquiescence in the gift) by the donee, but gifts by deed are perfect and complete, and vest the property in the donee, until disclaimer, (which disclaimer may be by parol. *Shepp. Touchst.* 285;) and after acceptance, in the former case, and until disclaimer in the latter, the property vests in the donee, without any delivery. *Perk. tit. Grant*, 57, 2 Roll. Abr. tit. *Grants* (X.), *Com. Dig. tit. Biens* (D. 2.). So, in the *Code Civil*, No. 938, it is said "a *donatio inter vivos*, duly accepted, shall be perfect by the sole consent of the parties; and the property in the articles so given shall be transferred to the donee, without the necessity of any other delivery."

But, upon a *donatio mortis causa*, the property does not vest in the donee without delivery. *Smith v. Smith*, 2 Stra. 955; *Bunn v. Markham*, 2 Marshall, 532. In *Irons v. Smallpiece*, had not these distinctions been overlooked, a rule would no doubt have been granted. And see 2 Mann. & Gr. 691, (a). The *donatio mortis causa* is not recognised in France; vide *Code Civil*, No. 893.

Byles, Serjt., (with whom was *Power*;) in support of the rule. There is no case to justify the extrajudicial opinion thrown out by the court in *Tapfield v. Hillman*. Property that is not in the possession of the grantor, or not in existence at the date of the grant, whatever be the terms of the instrument, cannot pass by it. The authorities are distinct to this effect. In *Perkins*, tit. *Grant*, § 65, it is said: "It is a common learning in the law, that a man cannot grant or charge that which he hath not; and, therefore, if a man grant a rent-charge out of the manor of Dale, and in truth he *hath nothing in that manor, and after he purchases the same manor, yet he shall hold it discharged." It has indeed [*383] been held that a man may grant personal property of which he is potentially, though not actually possessed. Thus, in *Perkins*, tit. *Grant*, § 90, (a) it is laid down that "A parson of a church may grant his tithes for years; and yet they are not in him at the time. But, if lord and tenant be, the lord cannot grant the wardship of the heir of the tenant while the tenant is living. But, if a man grant to me all the wool of his sheep for seven years, the grant is good." To the same effect is the *dictum* of Lord HOBART in *Grantham v. Hawley*, Hob. 132: "A parson may grant all the tithe-wool that he shall have in such a year; yet, perhaps, he shall have none: but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially." (b) In Sheppard's Touchstone, tit. *Grant*, p. 241, speaking of chattels personal that may or may not be the subjects of grant, it is said: "Also trees, grass, and corn growing and standing upon the ground, fruit upon the trees, (c) wool upon the sheep's back, are grantable. (d) But a man cannot grant the wool, &c., which shall grow on the sheep he shall have. Hob. 179. And yet a parson may grant all the tithes of wool which shall arise in such a year, although none may arise; for, the tithes, though not the wool, are potentially in the parson. 2 Roll. 48, pl. 20." In Bacon's Maxims, Reg. 14, it is said: "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum *interveniente novo actu." The instances that are given [*384] show that the present is not a case to which that rule can apply.

"The law doth not allow of grants, except there be a foundation of an interest in the grantor; for, the law will not accept of grants of titles or of things in action which are imperfect interests; much less will it allow a man to grant or encumber that which is no interest at all, but merely future. But, of declarations precedent before any interest vested the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent. Now, the best rule of distinction between grants and declarations is, that grants

(a) Citing H. 38 Ed. 3, fo. 6; P. 24 E. 3, fo. 25; M. 30 Hen. 6, Fitz. Abr. *Grant*, pl. 91. And see Fitz. Abr. tit. *Grant*, pl. 65; tit. *Jurisd.* pl. 43.

(b) 2 Roll. Abr. 48, tit. *Grants* (M), pl. 4, 5.

(c) Mr. Preston adds: "see stat. 5 & 6 Ed. 6, c. 19; *Haddam's case*, 3 Inst. 197, 2 East 167, 13 G. 1, c. 71."

(d) Mr. Preston adds: "provided they are potentially in the grantor. Hob 132."

are never countermandable, not in respect of the nature of the conveyance or instrument, though sometimes in respect of the interest granted they are, whereas declarations evermore are countermandable in their natures." If a man may grant all the goods that may come to his possession within a limited period, why may he not grant all the personal property that he may ever have? The court will hesitate before they hold that this can be done. When did this deed operate to the extent now contended for? Clearly not at the time of its execution; and yet such undoubtedly was the intention of the parties. Suppose the grantor had sold the goods otherwise than in market overt, could the grantee have followed them? [COLTMAN, J. The grantor might be the agent of the grantee for that purpose. TINDAL, C. J. A bankrupt continuing his trade after an act of bankruptcy committed, has been held to be, for this purpose, the agent of the assignees.] No case has been cited in opposition to the authorities referred to, and which clearly show that chattels neither actually nor potentially in the possession of the grantor at the time of the grant, do not pass thereby.

Cur. adv. vult.

*385] *TINDAL, C. J., now delivered the judgment of the court.

This was an action of trover and conversion, to which the defendant, amongst other pleas, pleaded, that, except as to certain goods specified in the plea, the plaintiff was not possessed as of his own property; upon which plea issue was joined; and the only question at the trial was, whether certain goods, not included amongst those excepted in the plea, were, at the time of the conversion, the property of the plaintiff.

It appeared at the trial that the plaintiff did, by a deed-poll, dated the 4th of August, 1843, in consideration of a sum of money lent and advanced to him by the defendant, "bargain, sell, and deliver unto the defendant, all and singular his goods, household furniture, plate, linen, china, stock and implements in trade, and other effects whatsoever, then remaining and being, *or which should at any time thereafter remain and be*, in, upon, or about his dwelling-house at Stoney-Stratford aforesaid, and also all other his effects elsewhere." The goods in dispute were not goods "remaining and being on the premises" at the time of the execution of the deed of bargain and sale, but were goods which had become the property of the plaintiff, and had also been brought upon the premises, subsequently to the execution of that instrument, and were remaining thereon at the time of the seizure under the bill of sale.

Under these circumstances, it was contended by the defendant's counsel, that the bill of sale covered these goods, as being goods remaining and being in or upon the dwelling-house at the time of the seizure: and the question is, whether the property in these goods passed under this bill of sale. It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff, as they should be acquired by *him,

*386] and brought on the premises, in satisfaction of the debt; but the

question before us arises on a plea which puts in issue *the property* in the goods, and nothing else ; and it amounts to this, whether, by law, a deed of bargain and sale of goods can pass the property in goods which are not in existence, or at all events which are not belonging to the grantor, at the time of executing the deed.

On the part of the plaintiff, the authorities were strong to show that no personal property could pass by grant, other than that which belonged to the grantor at the time of the execution of the deed. Perkins, tit. *Grants*, § 65, says, "It is a common learning in the law, that a man cannot grant or charge that which he hath not." So, in Hobart's Reports, page 132, it is laid down, that "a man cannot grant all the wool that shall grow upon his sheep *that he shall buy hereafter* ; for, there he hath it neither actually nor potentially"—a distinction which seems to be adopted by Perkins, tit. *Grants*, § 90, "that, if a man grants unto me all the wool of *his sheep* for seven years, the grant is good." By which is evidently intended, the wool of sheep which the grantor at that time has. And, still further, the plaintiff relied on the authority of Bacon's Maxims, Reg. 14: "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu.*" Upon which it is to be observed, that Lord Bacon takes the first branch of the maxim, namely, that a disposition of after-acquired property is altogether ~~im~~operative, as a proposition of law that is to be considered as beyond dispute ; and only labours to establish the second branch of the maxim, namely, that such disposition may be considered as a declaration precedent, which derives its effect from **some new act of the party* [*387 after the property is acquired ; for, he says, "The law doth not allow of grants, except there be a foundation of interest in the grantor ; for, the law will not accept of grants of titles, or of things in action, which are imperfect interests ; much less will it allow a man to grant or encumber that which is no interest at all, but merely future."

The principal contention on the part of the defendant was, that the facts of this case brought it within the exception in Lord Bacon's rule ; that the bringing of these goods on to the premises of the plaintiff, where they were seized, at a time subsequent to the execution of the bill of sale, was the new act done by the plaintiff which gave the declaration contained in the previous bill of sale its effect. But to this it appears to us to be an answer, that the evidence at the trial is altogether silent upon the circumstances which accompanied the bringing of the goods on the premises ; so that it is impossible to say whether it was the act of the plaintiff or not. And, further, the new act which Bacon relies upon, appears, in all the instances which he puts, to be an act done by the grantor for the avowed object and with the view of carrying the former grant or disposition into effect. Lord Bacon's language is, "there must be some new act or conveyance, to give life and vigour to the declaration precedent ;" which evidently imports more than the simple acquisition of the

property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative; but points at some new act to be done by the grantor in furtherance of the original disposition. Thus, the instance put, that, if there be a feoffment by a disseisee, and a letter of attorney to enter and make livery of seisin, and afterwards livery of seisin is made accordingly, this is a good feoffment, and yet he had no other thing than a right at the time of the delivery of the charter; "because," as Lord *388] Bacon *says, "a deed of feoffment is but a matter of declaration and evidence, and there is a new act, which is the livery subsequent, therefore it is good in law." So, if I covenant to purchase land, and to levy a fine to certain uses expressed in the indenture; this indenture to lead the uses, being but matter of declaration and countermandable at my pleasure, will suffice, though the land be purchased after; because there is a new act to be done, namely, the fine.(a) The same observation arises as to the instance put (b) of an authority given to J. S. to demise for years lands whereof I shall be afterwards seized, and I purchase lands, and J. S. my attorney doth afterwards demise them; this is a good demise, because the demise by my attorney is a new act, and all one with a demise by myself.

We think, therefore, this case is not brought within the exception to the fourteenth rule or maxim; there being no new act done by the grantor, indicating his intention that these goods should pass under the former bill of sale; but that the case falls under the general rule, and that no property in the goods passed to the defendant.

We therefore think the verdict upon the issue joined on the second plea, which denies property in the plaintiff, must be entered for him.

Rule absolute.

(a) Bacon's Maxims, Regula 14.

(b) Ibid.

*389] *BITTLESTON and Another, Assignees of WILLIAM TIMMIS, a Bankrupt, v. JOHN TIMMIS. Feb. 6.

Assumpsit by the assignees of A., a bankrupt, for money had and received by the defendant to the use of the plaintiffs, as assignees.

Plea, that before the commencement of the suit, and before the defendant had notice of any act of bankruptcy committed by A., and before any fiat against him, the defendant gave credit to A. in the sum of 148*l.* 10*s.*, by accepting, for his accommodation, and at his request, and without any consideration, a bill of exchange for that sum, which bill A., afterwards and before notice to the defendant of A.'s bankruptcy, endorsed and negotiated for value for his own use and benefit; that the credit so given by the defendant to A. was a credit of a nature extremely likely to end in a debt from the said A. to the defendant; that afterwards and before the commencement of the suit, the defendant was obliged to pay the bill to the holders, and thereupon and thereby the said A. became and was indebted to the defendant in the sum of 148*l.* 10*s.*; that, before the defendant had notice of any act of bankruptcy committed by A., and before any fiat against him, A. delivered to the defendant bills of exchange for 100*l.* and 20*l.*, for the purpose and in order that the defendant might receive the amounts thereof for the use of A.; that the defendant afterwards received such amounts, and was ready and willing to set off the one debt against the other:—

Held, that the acceptance of the bill for the accommodation of A., was a credit given to A.,

and that the delivery of the two bills by A. to the defendant for the purpose in the plea mentioned, was a *credit* given by A. to the defendant :—

Held, also, that such mutual credits resulted in debts, which might be set off against each other under the 6 G. 4, c. 16, s. 50 :—

Held, also, that the defendant's set-off was well pleaded in confession and avoidance.

ASSUMPSIT, for 500*l.*, for money had and received by the defendant for the use of plaintiffs as assignees, and for 500*l.* found to be due upon an account stated between the defendant and the plaintiffs as such assignees.

Plea—as to so much of the cause of action in the first count of the declaration mentioned as related to the sum of 120*l.*, parcel of the moneys in that count mentioned, and as to so much of the cause of action in the second count of the declaration mentioned as related to the sum of 120*l.*, parcel of the moneys in that count mentioned—that the said sum of 120*l.* in the plea *firstly above mentioned, and the said sum of 120*l.* [*390 in the plea secondly above mentioned, were one and the same sum of 120*l.*, and not different sums ; and that the said account in the said second count of the declaration mentioned, so far as related to the said sum of 120*l.* in the plea secondly above mentioned, was stated of and concerning the said sum of 120*l.* in the plea first above mentioned, and not concerning any other or different sum ; that, before the commencement of the suit, and long before the defendant had notice that any act of bankruptcy had been committed by the said William Timmis, and long before any fiat of bankruptcy issued against the said William Timmis, to wit, on the 4th of July, 1843, he the defendant *gave credit* to the said William Timmis in a large amount, to wit, in the sum of 148*l.* 10*s.*, by accepting for the accommodation of him the said William Timmis, and at his request, and without any consideration or value given to him the defendant for so doing, a certain bill of exchange in writing, bearing date on the 4th day of July, 1843, drawn by the said William Timmis upon the defendant, and by which the said William Timmis required the defendant to pay to him the said William Timmis, or his order, the sum of 148*l.* 10*s.*, which said bill of exchange the said William Timmis afterwards, and before any notice to the defendant of his said bankruptcy, endorsed, negotiated, and transferred for value for his own use and benefit ; that *the credit* so given by him the defendant to the said William Timmis was a *credit of a nature extremely likely to end in a debt* from the said William Timmis to the defendant ; that afterwards, and before the commencement of the suit, to wit, on the 7th of November, 1843, aforesaid, he the defendant was called upon and obliged to pay, and did pay, the said bill of exchange above mentioned to certain persons trading under the name, style, and firm of James Brown & Co., and [*391 then being the holders of the said bill, and thereupon and thereby, and before the commencement of the action, the said William Timmis became, and at the time of the commencement of the action was, and still was, indebted to the defendant in a large sum of money, to wit,

148*l.* 10*s.*, being the amount of the last-mentioned bill of exchange, for money paid by the defendant for the use of the said William Timmis, at his request, which last-mentioned sum of money was the same identical sum in and for the amount of which the defendant had given credit to the said William Timmis as aforesaid; that, before the defendant had notice of any act of bankruptcy by the said William Timmis committed, and before the date or issuing of any fiat against the said William Timmis, and before the commencement of the action, to wit, on the 17th of July, 1843, the said William Timmis delivered to the defendant a certain bill of exchange, bearing date the 17th day of July, 1843, drawn upon and accepted by one Michael Briggs, for the sum of 100*l.*, payable three months after the date thereof, and a certain other bill of exchange, bearing date the 8th of July, 1843, drawn upon and accepted by one Thomas Rose, for the sum of 20*l.*, payable three months after the date thereof, which said respective bills of exchange, so accepted as aforesaid, he the said William Timmis then delivered to the defendant as aforesaid for the purpose and in order that the defendant might obtain and receive the respective amounts thereof for, on behalf, and for the use of him the said William Timmis; that, afterwards, and after the bankruptcy of the said William Timmis, but before the issuing of any fiat against the said William Timmis, and before the commencement of the action, to wit, on the day and year last aforesaid, the defendant obtained and received the said sum of 120*l.*, being the amount of the said respective bills of exchange, which said sum of *120*l.* so obtained and received by
 *392] the defendant as last aforesaid, was the same sum of 120*l.* in the first count of the declaration and in the introductory part of this plea firstly above mentioned; and that the said sum of 148*l.* 10*s.* so paid by the defendant for the use of the said William Timmis to the holder of the said bill of exchange in the plea firstly above mentioned, and so due and owing from the said William Timmis to the defendant as aforesaid, exceeded the damages sustained by the plaintiffs as such assignees as aforesaid by reason of the non-performance by the defendant of his said promises as to the said sum of 120*l.* in the introductory part of the plea mentioned, and as to the causes of action relating to which the plea was pleaded; and the defendant was ready and willing and thereby offered to set off and allow to the plaintiffs the full amount of the said damages out of the said sum of 148*l.* 10*s.* so due and owing to the defendant as aforesaid, according to the form of the statute in that case made and provided: verification.

To this plea the plaintiffs demurred specially, assigning for causes—that the plea afforded no answer in law to the matters and causes of action to which it was pleaded; that it neither traversed nor confessed and avoided those causes of action; that the plea, confessing as it did the causes of action in the introductory part of that plea mentioned, sought to set off against those causes of action a debt due from the said William Timmis

to the defendant before the bankruptcy of the said William Timmis, and did not show any debt or sum of money whatsoever to be due and owing to him the defendant from the plaintiffs as assignees of the said William Timmis; that the plea should have shown affirmatively that the said William Timmis delivered to the defendant the said bills of exchange in manner and form as in the plea mentioned, and also that the *defendant obtained and received the said sum of 120*l.*, being the amount of the said bills, in manner and form as in the plea mentioned, before the bankruptcy of the said William Timmis; that the plea sought to set off debts which were not mutual; that the plea did not sufficiently show any mutual credit between the bankrupt and the defendant; that the plea attempted argumentatively to deny that the said sum of 120*l.* in the first count and in the introductory part of the plea mentioned, was received by the defendant to the use of the plaintiffs as assignees of the said William Timmis; that the plea amounted to the general issue; that it was double, inasmuch as it argumentatively denied that the last-mentioned sum of 120*l.* was received to the use of the plaintiffs as assignees of the said William Timmis, and also sought to show matter of set-off to the same causes of action, that is to say, to the same sum of 120*l.*; and also that the plea was in other respects bad, informal, inartificial, and defective. Joinder. [*393]

Channell, Serjt., in support of the demurrer. (a) The plaintiffs claim in respect of money alleged to have been received by the defendant to their use as assignees. The debt or "credit" which the defendant seeks to set up by way of answer is, that, before the commencement of the suit, and before he had notice that any act *of bankruptcy had been committed by William Timmis, the bankrupt, and before the issuing of the fiat, the defendant accepted a bill of exchange for 148*l.* 10*s.* for the accommodation of William Timmis, and that the defendant was called upon and obliged to pay the bill to the endorsees thereof. The plea is evidently framed with reference to the case of *Hulme v. Muggleston*, 3 M. & W. 30, 6 Dowl. P. C. 112. There, to assumpsit by the assignees of one S., a bankrupt, for money had and received to the use of the assignees since the bankruptcy, the defendant pleaded, that, before the bankruptcy, and before notice of any act of bankruptcy, he gave credit to the bankrupt to the amount of 50*l.*, by endorsing for his accommodation, and without consideration, a bill of exchange for that amount, drawn by him, and payable to the bankrupt's order, and that such credit was of a nature ex- [*394]

(a) The points marked for argument on the part of the plaintiffs, were as follow:—"The plaintiffs, on the argument of this demurrer, will contend that the third plea discloses no case either of set-off or of mutual credit, and that, even if it was so substantially, such mutual credit ought to be more precisely averred; that it amounts to the general issue, and argumentatively denies that the money was received for the plaintiffs' use; or, at all events, that it was received under such circumstances as would imply a promise to pay on request, and does not admit any such promise to have been in fact made."

For the defendant—"that the third plea discloses a sufficient defence sufficiently pleaded by way of set-off or mutual credit."

tremely likely to end in a debt: the plea then alleged that the amount of the bill was paid by the defendant on its dishonour, after the bankruptcy, but before the commencement of the action, and the bankrupt thereupon became indebted to the defendant; that, before the bankruptcy, S. drew a bill of exchange on the Chesterfield bank, and delivered it to the defendant, by way of loan, that he might raise the amount, and thereby gave credit to the defendant to that amount; and that afterwards, before the bankruptcy, the defendant obtained the amount of the said bill from the Chesterfield bank; and that he was ready and willing to set off the two sums against each other: and it was held that the plea, upon *general demurrer*, sufficiently showed such a giving of credit to the bankrupt within the statute 6 G. 4, c. 16, s. 50, as might be the subject of set-off in an action brought by his assignees. Here, however, the question is,

*395] whether the plea is sufficient, where *the circumstance of its not sufficiently disclosing a case of mutual credit within the statute is pointed out as ground of special demurrer. [MAULE, J., referred to *Young v. The Bank of Bengal*, 1 E. F. Moore's Privy Council Cases, 150, 1 Deacon's Bankruptcy Cases, 622.] Assuming, however, that the plea does show a case of mutual credit within the meaning of the act, still, it affords no answer to an action for money had and received to the use of the assignees. Thus, in *Wood v. Smith*, 4 M. & W. 522, 7 Dowl. P. C. 214, to a count for money had and received to the use of assignees of a bankrupt, the defendant pleaded, that, although the money mentioned remained and was in the possession of the defendant after the bankruptcy, yet that it was in fact received before the issuing of the fiat, and from thence remained in the defendant's possession; that, before and at the time of the issuing of the fiat, the bankrupt was indebted to the defendant in a larger sum; and that, at the time he so gave credit to the bankrupt, he had no notice of any act of bankruptcy: and the plea was held bad as a plea of set-off. So, in *Groom v. Mealey*, 2 N. C. 138, 2 Scott, 171, where, to a count in debt by the assignees of a bankrupt, for money had and received by the defendant to the use of the plaintiffs as assignees, (not stating whether received before or since the bankruptcy,) the defendant pleaded a set-off for money due to him on an account stated with the bankrupt before his bankruptcy; it was held that the plea was bad, for that it did not show that the debts were mutual. [ERLE, J. The money here having been received after an act of bankruptcy, but before notice, may not the defendant, since the 2 & 3 Vict. c. 29, say, that, as between him and the bankrupt, the money was received before the fiat, and so

*396] bring himself within the mutual credit clause of the 6 G. 4, c. 16?] The defendant cannot be in a better situation than if he had made the allegation that was wanting in *Groom v. Mealey*. The plea is clearly double: it confesses the receipt of money to the use of the assignees, and does not avoid it; or, at all events, it is an argumentative denial of the receipt of the money to the use of the assignees, and is bad on that ground.

Talfourd, Serjt., *contrd.* *Hulme v. Muggleston*, 3 M. & W. 30, 6 Dowl. P. C. 112, is a distinct authority for the defendant upon the main point, and also on the question of duplicity. [CRESSWELL, J. The marginal note in 3 M. & W. 30, is evidently wrong, in stating that the credit was given to the bankrupt *before* the bankruptcy.] The statute 2 & 3 Vict. c. 29, makes that case and the present identical. This is exactly a case of mutual credit. In *Russell v. Bell*, 8 M. & W. 277, in assumpsit by the assignees of a bankrupt for goods sold and delivered by the bankrupt, with counts for money paid, money had and received, and money due upon an account stated, the defendant pleaded, by the way of set-off, that before notice of any act of bankruptcy, and before the issuing of the fiat, and before action brought, the defendant gave credit to the bankrupt, by accepting certain bills of exchange for his accommodation and at his request, without any consideration or value, which said bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit; that the credits so given were likely to end in debts from the bankrupt to the defendants; and that afterwards, and before the commencement of the action, the defendant paid the bills: and it was held that the plea was good as showing a mutual credit within the 6 G. 4, c. 16, s. 50. [CRESSWELL, J. Does the statute 2 & 3 Vict. c. 29, apply to a case of agency? *Does this plea disclose a "transaction" within the meaning of that act? The plea states that the defendant had the two bills, the amount of which the plaintiffs seek to recover in the action, delivered to him by the bankrupt "for the purpose and in order that the defendant might obtain and receive the respective amounts thereof for and on behalf and for the use of him, the bankrupt." Here the "transaction" is not completed.] In *Pariente v. Pennell*, 2 M. & Rob. 517, it was held that goods suffered by the true owner to remain in the possession of a trader till after a secret act of bankruptcy, but taken possession of before the fiat, do not, since the 2 & 3 Vict. c. 29, pass to the assignees. *Unwin v. St. Quintin*, 11 M. & W. 277, 2 Dowl. N. S. 790, is an authority to show that this plea is not bad as an argumentative denial of the cause of action stated in the declaration. The plea admits that *prima facie* the money was received to the use of the assignees, and then it alleges circumstances which disclose a good answer to the action. Neither is the plea obnoxious to the charge of duplicity. In *Lazarus v. Cowie*, 3 Q. B. 459, 2 Gale & D. 487, to a declaration on a bill of exchange, by endorsee against acceptor, the defendant pleaded, that the acceptance was for the accommodation of the drawer, and without any consideration; that before the endorsement to the plaintiff, the drawer negotiated the bill for his own use, and paid it when due, whereupon it was re-delivered to him; that, after it was due, the drawer endorsed it to the plaintiff without its being re-stamped, or payment of any duty in respect of the re-issuing; and that the plaintiff, before and at the time of the endorsement to him, had notice of the premises: and it was held tha.

the plea was not bad for duplicity, because, although the allegation of
 *398] notice *was unnecessary, the facts alleged constituted only one
 defence.

Cur. adv. vult.

Channell, Serjt., replied.

TINDAL, C. J., now delivered the judgment of the court.

This case was argued before us during the last term, when two points were mainly relied on for the plaintiffs; first, that the acceptance of a bill of exchange by the defendant for the accommodation of the bankrupt was not a *credit* within the meaning of the fiftieth section of the stat. 6 G. 4, c. 16; secondly, that a plea confessing the receipt of money to the use of the plaintiffs as assignees, did not avoid that cause of action by showing a *credit* given to the bankrupt, and pleading it as a *set-off* under that section.

But we are of opinion that the plea is good.

The acceptor of a bill of exchange for the accommodation of another, gives him credit for the amount; which, when paid by the acceptor, may certainly be proved under a fiat issued against the party for whose accommodation the bill was accepted, and may be made the subject-matter of a set-off under the mutual credit clause of the 6 G. 4, c. 16: *Smith v. Hodson*, 4 T. R. 211; *Ex parte Boyle*, Cooke's B. L. 561, and *Ex parte Wagstaff*, 13 Ves. 65, are distinct authorities for that proposition. And, although, in the case of *Young v. The Bank of Bengal*, 1 Deacon's Bankruptcy Cases, 622, 1 E. F. Moore's Privy Council Cases, 150, some of the cases on the subject of mutual credit were treated as not having been well decided, the authority of the cases above mentioned is left untouched: and
 *399] *Smith v. Hodson* has been expressly recognised by the court of *Exchequer, in *Hulme v. Muggleston*, 3 M. & W. 30, 6 Dowl. P. C. 112, and *Russell v. Bell*, 8 M. & W. 277. The plea therefore shows, on the one hand, a credit for 148*l.* 10*s.* given by the defendant to the bankrupt before the defendant had notice of any act of bankruptcy or the fiat, and, on the other hand, that before such notice the bankrupt delivered to him two bills of exchange, one for 100*l.*, the other for 20*l.*, in order that the defendant might receive the respective amounts thereof on behalf and for the use of him (the bankrupt), and that the defendant received the same after the bankruptcy and before the fiat. The defendant therefore gave credit to the bankrupt, and the bankrupt to the defendant, before the latter had notice of any act of bankruptcy, and before the fiat issued; and those credits have resulted in debts; the one, therefore, may be set off against the other by the express words of the 6 G. 4, c. 16, s. 50.

But it was contended, secondly, that, although the credits were mutual between the bankrupt and the defendant, yet, as the declaration was for money had and received to the use of the assignees, and not to the use of the bankrupt, the debt due to the defendant from the bankrupt could not be set off, the debts not being due to and from the same parties; for which *Wood v. Smith*, 4 M. & W. 522, 7 Dowl. P. C. 214, was cited.

The words of the statute furnish an answer to this objection. The plea, indeed, confesses the receipt of money to the use of the assignees, but it shows how their title to that money arose, viz., out of a credit given by the bankrupt : and the 6 G. 4, c. 16, s. 50, provides, that, "where there has been mutual credit, or where there are mutual debts, between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, and what shall appear *due on either side on the balance of such account, and no more, [*400 shall be paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt may also be set off in manner aforesaid against such estate : provided the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." Now, the assignees are suing for money due to the estate, the debt set off is due from the estate, and there had been mutual credit between the bankrupt and the defendant before the defendant had any notice of an act of bankruptcy : the one, therefore, may be set against the other, by the very words of that section. In *Wood v. Smith*, 4 M. & W. 522, 7 Dowl. P. C. 214, the plea did not show that there had been mutual credit, or that there were mutual debts between the bankrupt and the defendant : that case, therefore, is no authority for the decision in this case. In *Kinder v. Butterworth*, 6 B. & C. 42, 9 D. & R. 47, where the debt sued for and the debt set off both accrued after the act of bankruptcy, it was agreed by the court that such set-off would be valid where the 6 G. 4, c. 16, applied, although the declaration was for money had and received *to the use of the plaintiffs as assignees*, but was void in that particular case, which was under the 5 G. 2, c. 30. In *Southwood, Assignee of Edbrooke, v. Taylor*, 1 B. & Ald. 471, which was an action for goods sold and delivered by the plaintiff as assignee, the defendant, who had pleaded the general issue, and given notice of set-off, was allowed by HOLROYD, J., to give in evidence a debt due from the bankrupt before any act of bankruptcy ; the sale of the goods mentioned in the declaration having been in fact made by the bankrupt after an act of bankruptcy, but more than two months before the date of the commission. A *rule [*401 nisi for a new trial was moved for, but refused. It is true that Lord ELLENBOROUGH, in refusing that rule, after saying that the credits were mutual, and therefore the debt due from the bankrupt was the subject-matter of set-off, expressed an opinion that the plaintiff ought to have declared for goods sold and delivered by the bankrupt, because the transaction, being protected by the 46 G. 3, c. 135, s. 1, was as effectual as if no act of bankruptcy had taken place ; and, if he had done so, no objection could have been made to the set-off. Notwithstanding that *dictum*, we think that the plaintiffs in the present case have declared properly for money had and received to their use as assignees, but that their claim is answered by the set-off that has been pleaded. And this disposes of

another objection that was made to the plea, viz., that it is an argumentative denial that the money received by the defendant was received to the use of the plaintiffs as assignees, and therefore amounts to a circuitous general issue.

Upon the whole, then, it appears to us that the money received by the defendant after the bankruptcy, was received to the use of the plaintiffs as assignees; that he was entitled to set off against it the amount of the accommodation acceptance paid by him: and that such set-off was properly pleaded by way of confession and avoidance of the plaintiffs' cause of action.

Our judgment must therefore be for the defendant.

Judgment for the defendant.

*402] *WILLIAMS v. Sir C. M. BURRELL, Bart., and Another.

Feb. 6.

A., being tenant for life, with a leasing power, by indenture of lease bearing date in March, 1805, demised to B. for ninety-nine years, if three persons therein named should so long live; this indenture contained the following clause:—"And A., for himself, his heirs, and assigns, the demised premises, unto B., his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements, before expressed, against all persons whatsoever lawfully claiming the same, shall and will, during the said term, warrant and defend." This lease having, upon the death of A., been held to be void as against the remainder-man by the judgment of a court of law, on the ground that it was not made in due conformity with the leasing power:—*Held*, that the clause in question operated as an express covenant for quiet enjoyment during the whole term granted by the lease; and consequently that B., or his assignee, and the executors, &c., of such assignee, might recover against the executors of A. the value of the term, the costs of defending an action of ejectment brought by the remainder-man, and also the sum recovered by him for mesne profits.

THIS was a case sent by the Master of the Rolls for the opinion of this court.

The Right Hon. Charles, Earl of Egremont, by his will, bearing date the 31st of July, 1761, gave and devised all his manors, messuages, lands, advowsons, rents, and hereditaments, parts and shares of manors, &c., in the several counties of Somerset, Dorset, and Cornwall, comprising, *inter alia*, the premises demised by the two several indentures of lease hereinafter stated, with their respective rights, members, and appurtenances, unto his the testator's eldest son, George, Lord Cockermouth, and his assigns, for and during the term of his natural life, without impeachment of waste; with divers remainders over. And in the said will was contained a power for the several and respective persons to whom any estate for life was thereinbefore devised, when and as they should respectively be in the actual possession of the premises by virtue of the limitations thereinbefore contained, by indenture or indentures under their respective hands and seals, to demise, lease, and grant, in possession or reversion, for one life, or for two or three *lives, or for

*403] any term or number of years determinable upon one life, or two

or three lives, any part of the said premises usually so leased, so that all the leases to be made by virtue thereof, which should be in force at the same time, should be determinable on the dropping of one life, or the dropping of two or three lives at the most; and so that there should be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more; and so that, in every of the leases to be made and granted by virtue of the several powers aforesaid, there should be contained usual and reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby to be reserved, in case the rent or rents should be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained; and so as no clause and clauses should be contained in any of the said leases, giving power to any lessee to commit waste, or exempting him, her, or them from punishment for committing the same; and so as the respective lessees should execute counterparts of all such leases.

The testator, Charles, Earl of Egremont, departed this life in or about the year 1763, leaving his eldest son, George, Lord Cockermouth, him surviving, who thereupon became George, Earl of Egremont.

The said George, Earl of Egremont, immediately upon the decease of the testator, entered upon the said estates, including the said demised premises, as devisee for life under the said will of the testator.

The said George, Earl of Egremont, afterwards assumed the name of O'Brien.

On the 24th of March, 1805, an indenture of lease in the following words was duly executed by the said George O'Brien, Earl of Egremont:—

“ This indenture, made the 24th day of March, 1805, *between [*404 George O'Brien, Earl of Egremont, of the one part, and John Williams, of the other part, witnesseth that, for and in consideration of the yearly rent hereby reserved, and the covenants herein contained, he the said earl doth hereby demise and lease unto the said John Williams, his executors, administrators, and assigns, all that messuage, converted into two dwellings, and garden in Broad street, in Williton aforesaid, and adjoining Francis Hale's house, being part of Manwell's tenement, which said two dwellings are in the occupation of the said John Williams and William Wyne, excepting out of this present demise unto the said earl, his heirs and assigns, all quarries, mines, and ores, timber-trees, pollards, and saplings, and trees likely to become timber, and lops and tops of maiden trees, coppices, woods, and underwoods, now or hereafter growing upon the said demised premises, with free liberty to fell and carry away the same, to have and to hold the said demised premises unto the said John Williams, his executors, administrators, and assigns, for the term of ninety-nine years, if James Farthing, aged twenty-eight years, Mary Farthing, aged twenty years, and Ann Farthing, aged seventeen

years, or any of them, shall so long live; the said John Williams, his executors, administrators, and assigns, yielding and paying therefore, yearly and every year during the said term, unto the said earl, his heirs and assigns, the rent of 1*l.* a year, free from all taxes and encumbrances, at Lady-day, Midsummer, Michaelmas, and Christmas, by equal portions; and also yielding and paying for a heriot on the several deaths of the said James Farthing, Mary Farthing, and Ann Farthing (whether they die in succession or otherwise), the sum of 1*s.* And the said John Williams, for himself, his executors, administrators, and assigns, doth covenant with the said earl, his heirs and assigns, that the said John Williams,

*405] his executors, administrators, *and assigns, shall and will pay or cause to be paid unto the said earl, his heirs and assigns, the said yearly rent and other payments in manner aforesaid, and shall and will repair and keep the premises hereby granted, with the appurtenances, in and with all necessary reparations during the said term, and the same at the end thereof, so well and sufficiently repaired and kept at his and their charges, will leave and yield up, and shall and will perform suit to the courts of the manor of Williton Regis; and shall and will, within six months next after notice to him or them given, or left at his or their place of abode for the time being, or on the said premises hereby demised, produce unto the said earl, his heirs and assigns, or to his or their agent, all the said lives, if living, or otherwise make it appear to him or them, within the time aforesaid, or within a reasonable time if they or either of them should happen to be in foreign parts, by a sufficient certificate, that all such persons or person so abroad be living. And, if it happen the said yearly rent or other payments aforesaid, or either of them, shall be unpaid, in part or in all, after either of the days of payment aforesaid, then it shall be lawful for the said earl, his heirs and assigns, into the said premises, to enter, and distrain, and the distress there found to dispose of according to law; and in default of such sufficient distress for satisfaction of the rent and other payments, with all costs and charges thereon, or, if the said John Williams, his executors, administrators, and assigns, shall suffer the said premises, or any part thereof, to be ruinous to the value of 40*s.*, and the same shall not repair within six months next after notice to him or them given, or left at his or their place of abode for the time being, then, for all or either of the causes aforesaid, it shall be lawful for the said earl, his heirs and assigns, into the said premises, or any part thereof in the name of the whole, to re-enter, and the same to

*406] *repossess as in his or their former estate. And the said earl, for himself, his heirs and assigns, the said demised premises, with the appurtenances, unto the said John Williams, his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements before expressed, against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend."

A counterpart of the same lease was duly executed by the said John Williams.

The lease was invalid as an execution of the power, by reason that it did not contain the same covenants as were contained in the ancient leases of the same premises.

Williams had not, at the time of accepting the said lease, any notice of the said ancient leases or any of them.

Williams entered upon the said demised premises under and by virtue of the lease to him thereof, and enjoyed and possessed the term so granted as aforesaid, until the election of his tenants as hereafter stated.

One of the lives in the said lease is still living.

By a certain other indenture of lease, bearing date the 25th of March, 1805, and made between the said George O'Brien, Earl of Egremont, since deceased, of the one part, and John Farthing, of Williton aforesaid; of the other part, and duly executed by the said earl, for the considerations therein mentioned, the said earl did demise and lease unto the said John Farthing, all that messuage, then converted into two dwellings, and garden, in Long street, in Williton aforesaid, and adjoining Francis Hale's house, being part of Manwell's tenement, which two dwellings then were in the occupation of the said John Farthing and William Wyne, (except as therein is excepted,) being also part of the said demised premises, to hold the said demised premises unto the said John Farthing, (since deceased,) his executors, administrators, and assigns, for the term of ninety-
[*407
nine years, if James Farthing, then aged twenty-eight years, Mary Farthing, then aged twenty years, and Ann Farthing, then aged seventeen years, or either of them, should so long live, under payment by the said lessee, his executors, administrators, or assigns, of the net yearly rent of 1*l.*, and, on the several deaths of the said James Farthing, Mary Farthing, and Ann Farthing, of 1*s.* for a heriot.

The last-mentioned lease was in other respects, *mutatis mutandis*, in the same words as the lease hereinbefore set forth.

A counterpart of the above lease to the said John Farthing was duly executed by him.

This lease was invalid as an execution of the said power, by reason that it did not contain the same covenants as were contained in the ancient leases of the same premises.

John Farthing had not, at the time of accepting the said lease, any notice of the said ancient leases, or any of them.

The said John Farthing entered upon the demised premises under and by virtue of the lease to him thereof granted, and continued in possession thereof until the period of his death, as hereinafter mentioned.

The said Ann Farthing is still living.

By a deed-poll under the hand and seal of the said John Farthing, (endorsed upon the last-mentioned indenture of lease,) and bearing date the 4th of May, 1808, the said John Farthing, in consideration of 53*l.* 10*s.*

to him paid by Peter Boswell, assigned unto the said Peter Boswell, his executors, administrators, and assigns, all and singular the premises comprised in and demised by the said therein within indenture of lease dated the 25th of March, 1805, together with the said indenture of lease, to hold
 *408] unto the said Peter Boswell, his *executors, administrators, and assigns, for all the then unexpired residue of the said term in the said demised premises.

The said Peter Boswell departed this life in or about the month of June, 1830, having first duly made and published his last will and testament in writing, bearing date the 14th of January, 1828, and thereof appointed the said John Williams sole executor, by whom the same was duly proved in the consistorial episcopal court of Wells, on the 20th of July, 1830; and the said John Williams, as such executor as aforesaid, entered into and upon, and remained in the possession and enjoyment of, the said last-mentioned term, until the eviction of his tenants as hereinafter stated.

The said George O'Brien, Earl of Egremont, duly made and published his will, bearing date the 10th of September, 1834, and thereof appointed the defendants and William Tyler (since deceased) executors; and the said George O'Brien, Earl of Egremont, departed this life in or about the month of November, 1837; and his said will was duly proved by the defendants in the prerogative court of the Archbishop of Canterbury on or about the 24th of January, 1838.

Upon the death of the said George O'Brien, Earl of Egremont, the Right Honourable George Wyndham, the present Earl of Egremont, entered upon the estates so devised by the said will of the said Charles, Earl of Egremont, and lawfully claimed to be the owner of and entitled to the said several demised premises, discharged from the several indentures of lease, dated respectively the 24th of March, 1805, and the 25th of March, 1805, as being part of the said estates, on the ground that the said several leases were void, not having been made in conformity with the leasing power contained in the said will of the said Charles, Earl of Egremont.

*409] On or about the 10th of January, 1840, the several *tenants then holding under the said John Williams, and then being in the actual possession and occupation of the premises comprised in the said several indentures of lease respectively, were served with declarations in two several actions of ejectment, upon the demise and on the prosecution of the said George Wyndham, Earl of Egremont, to recover possession of the said demised premises respectively, upon the ground of the said invalidity of the said several leases.

The said John Williams thereupon caused the said executors of the said George O'Brien, Earl of Egremont, to be served with a notice in writing, to the effect that he was advised by counsel that the said leases were invalid, and that he had no defence to the said actions; and that, acting under the advice of counsel, he should not defend the same; and to the

further effect, that the said leases contained an absolute warranty of title on behalf of the said George O'Brien, Earl of Egremont, the lessor, his heirs and assigns, against all persons whatsoever; and that he should require the said executors, in performance of the said warranty, to defend him and his tenants in the possession of the said premises for the residue of the term thereby granted, and determinable as aforesaid; and that, in case of the eviction from the said premises, he should claim, and proceed to recover of them the said executors, the value of the said demised premises, and the rents, issues, and profits thereof, and all other loss, charges, damages, and expenses whatsoever which he or his said tenants, or any of them, or any other person or persons, should or might suffer, sustain, or be liable or put unto, by or by reason or means of such eviction, or the said action, or any other action, proceeding, cause, matter, or thing whatsoever consequent thereon, or relating thereto.

The solicitor of the executors, in consequence of such notice, wrote and sent to the said John Williams a *notice in writing, to the effect that he was instructed by the said executors of the said late Earl of Egremont, at the expense of his estate, to appear and plead to the said ejectments, but that these and all other proceedings to be taken towards defending the said ejectments were to be adopted and carried on without prejudice to the right of the said executors to reject and resist any claim that might be made against them in respect of the said leases granted by the said late earl. [*410

The attorneys of the defendants *accordingly* (qu.) appeared to, and defended, the said actions of ejectment in the name of the said John Williams, and the same were tried at the Somerset Spring assizes for the year 1840, when a verdict was found for the plaintiff in each of the said actions: and, on or about the 29th of September, 1842, the said George Wyndham, Earl of Egremont, took lawful possession of the said demised premises, and lawfully evicted the said John Williams and his tenants therefrom.

The said executors paid and discharged the costs taxed of the said George Wyndham, Earl of Egremont, in the said actions of ejectment; but the said John Williams was lawfully called upon to pay, and was forced to pay, and did pay to the said George Wyndham, Earl of Egremont, the sum of 13*l.* 16*s.* 1*d.* for the mesne profits of the said premises demised by the said indenture of lease of the 24th of March, 1805; and the said John Williams also incurred certain necessary costs, charges, and expenses in and about the said action so brought for the recovery of the last-mentioned premises, amounting to 24*l.* and upwards.

The value of the premises demised by the said indenture of the 24th of March, 1805, during the residue of the before-mentioned term therein which remained unexpired at the period of the eviction aforesaid, amounted to the sum of 75*l.*

411] *The said John Williams was also lawfully called upon to pay and was forced to pay, and did pay, to the said George Wyndham, Earl of Egremont, the sum of 14*l.* for the mesne profits of the said premises demised by the said indenture of lease of the 25th of March, 1805. The said John Williams also incurred certain necessary costs, charges and expenses, in and about the said action for the recovery of the last-mentioned premises, amounting to 25*l.* and upwards.

The value of the said premises demised by the said indenture of the 25th of March, 1805, during the residue of the before-mentioned term therein which remained unexpired at the period of the eviction aforesaid, amounted to the sum of 80*l.*

The defendants have received assets of the testator George O'Brien, Earl of Egremont, more than sufficient for the payment of the several sums hereinbefore mentioned.

The questions for the opinion of the court are—first, whether the said John Williams was entitled to recover from the defendants, as executors of the said George O'Brien, Earl of Egremont, the sums of 13*l.* 16*s.* 1*d.*, 24*l.*, and 75*l.*, or any and which of them; and whether any interest on such sums, or any or which of them.

Secondly, whether the said John Williams, as such executor as aforesaid, was entitled to recover from the said defendants, as executors of the said George O'Brien, Earl of Egremont, the said sums of 14*l.*, 25*l.*, and 80*l.*, or any and which of them; and whether he was entitled to any interest on such sums, or any and which of them.

The case was argued in Hilary term last.

Byles, Serjt., (with whom was *Butt*,) for the plaintiff. The circumstances out of which the questions to be discussed *in this case
*412] arise, are as follow:—On the 24th and 25th of March, 1806, George, Earl of Egremont, being tenant for life under the will of his father, with a power of leasing, demised certain premises to the plaintiff and to one John Farthing respectively, for the term of ninety-nine years, if three persons respectfully named in the leases should so long live. These leases contained the following clause: “And the said earl, for himself, *his heirs and assigns*, the said demised premises, with the appurtenances, unto the said [lessee,] his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements before expressed, against all persons whomsoever lawfully claiming the same, *shall and will during the same term warrant and defend*.” These leases being invalid as an execution of the power, upon the death of the lessor, the present earl brought ejectments, and recovered possession of the premises thereby demised, as well as certain mesne profits. The plaintiff, the lessee named in the first lease, and who is also the executor of the assignee of the second lease, now seeks to recover against the executors of the late earl, the lessor, the value of the respective terms, the sums paid by him for mesne

profits, and the costs incurred by him in defending the actions of ejectment at their request.

For the plaintiff it will be contended: first, that the warranty contained in the clause above set forth is equivalent to a covenant for quiet enjoyment, or to a covenant for title: secondly, that it is an *express* and not an *implied* covenant, or a covenant in law: thirdly, that it is a covenant continuing to the end of the term intended to be granted: fourthly, that the executors of the lessor are liable for a breach of this express covenant: fifthly, that it is a covenant that runs with the land, and consequently enures to the benefit of the assignee of the term: sixthly, that an action of covenant lies at the suit *of the executor of the assignee, notwithstanding the breach did not happen until after the death of the lessor. [*413]

1. What is meant by the words "warrant and defend," when found in a lease for years? In the case of real estate, they have a well understood technical meaning. In Sheppard's Touchstone, ch. 8, § 1, p. 181, it is said: "A warranty is a covenant real annexed to lands or tenements (a) whereby a man and his heirs are bound to warrant the same. Or it is where a man is bound to warrant the land or hereditament that another hath. (b) And he that doth make this warranty is called the warrantor, and he to whom it is made, the warrantee." The learned author then proceeds, in sect. 5, to consider to what estates a warranty may be annexed, and how. He says, p. 184: "A warranty in deed may be annexed to estates of inheritance or freehold; and that, not only of corporeal things which pass by livery, as houses, lands, and the like, but also of incorporeal things which lie in grant, as advowsons, rents, commons, estovers, and the like, which issue out of lands or tenements; and that, not only to inheritances *in esse*, but also to such as are newly created; as, a man (some say) may grant a rent, &c., *de novo* out of land for life, in tail, or in fee, with warranty. So, a warranty in law may extend to a rent newly created; and, therefore, if such a rent be granted in exchange for an acre of land, this exchange and warranty thereunto annexed are good. But a warranty (c) may not be annexed to an estate, or lease, for years, albeit it be a lease for 1000 years, nor to any other chattel; and therefore, in all actions the which lessee for *years may have, as trespass, &c., a warranty cannot be pleaded in bar." (d) This clause, [*414] being found in a demise of a term for years, though not strictly and properly a *warranty*, must be construed according to the popular meaning of the words used in it: and the authorities are express to show that it amounts to a covenant for quiet enjoyment, or to a covenant for title.

(a) Mr. Preston here adds, "or rather to an estate of freehold or inheritance if named for that purpose, and, in cases of warranty, by implication of law, though not named."

(b) Mr. P. adds, "so that the warranty is knit to an estate which the warranty hath or taketh."

(c) Mr. P. adds, "formal and proper."

(d) Mr. P. adds, "by way of rebutter."

Thus, in Sheppard's Touchstone, ch. 7, § 4, p. 163, it is said, that, "If a man make a lease for years, and warrant it to the lessee, his heirs and assigns, during the term; or, he that hath right to the land confirms the estate of the lessee for years, with warranty; in these cases, howbeit this be not a warranty, nor in the nature of a warranty, yet it shall be construed a good covenant in law for the quiet enjoying of the thing." The same law is laid down in 22 Viner's Abridgment, 421.(a) In *Pincombe v. Rudge*, Hob. 3, Yelv. 139,(b) Amy Pincombe and others, plaintiffs, brought an action of covenant against John Rudge, and declared that Rudge, the defendant, by his indenture dated 30 Octobris, 32 Eliz., did demise unto them all his lands in Southmolton, in the tenure of J. S., by these words, *dedit, concessit, demisit, et confirmavit*, unto the said plaintiffs, *habend. et tenend.* for their lives, rendering 30*l.* a year rent; with this express clause of warranty:—"And the said John Rudge and his heirs, all the said premises unto the said Amy, &c., against all persons claiming by, from, or under the said John, his ancestors or heirs, shall and will warrant, acquit, and defend during the term aforesaid." This was a grant of a reversion upon an estate for life made to one John Pincombe and others, in fifteenth of the Queen, by the same John Rudge, who did attorn *415] to the grant to Amy and others; and the same John Rudge, 'in the thirtieth year of the Queen, had demised the premises unto one William Hunt for term of years to begin after the death of the said John Pincombe and others. After all this, John Pincombe, the last tenant for life, died; Amy Pincombe and the other grantees of the reversion entered, upon whom William Hunt, the lessee entered; whereupon they brought their action of covenant against John Rudge, and laid their damage to 200*l.*; whereupon the defendant pleaded in bar, that the plaintiff had formerly brought a *warrantia chartæ* against him upon the warranty aforesaid for the same lands, and that it was yet hanging and undetermined; whereupon the plaintiff demurred in law, and judgment given for him, and damages and costs 28*l.* 6*s.* 8*d.*: whereupon Rudge brought a writ of error in the Exchequer Chamber; and the only question was, whether, upon this clause of warranty real annexed to a freehold, an action of covenant to recover damages could be grounded. And it was agreed by all the judges in the Exchequer Chamber, "that this action of covenant will lie; because that, though the warranty was annexed to a freehold, yet the breach and impeaching was not of a freehold, but of a chattel, (that is to say,) of a lease for years, for which there could neither be a voucher, rebutter, nor *warrantia chartæ*; so that, though there had been a judgment in the *warrantia chartæ* in this case, yet neither upon entry nor upon recovery in *ejectione firmæ* upon this lease there could be neither voucher nor rebutter, nor value upon the *warrantia chartæ*: and therefore a real warranty is a covenant real, when the free

(a) *Warrantia Chartæ* (E), P. 22 H. 6, fo. 52, pl. 26, there cited, is not in point.

(b) *Rudge v. Pincombe*, 1 Roll. 25.

hold is brought in question ; but when a lease is in question, or any other loss that doth not draw away the freehold, it may be used as a personal covenant, whereupon damages may be recovered ; so it is both a real and personal covenant, to several ends and respects." And so it was adjudged for the defendant upon the writ of error. That is a distinct [*416 authority to show, that, when a warranty is annexed to an estate for years, it may be dealt with as a personal covenant. Another authority to the same effect is to be found in Sheppard's Touchstone, ch. 8, § 7, p. 186 : " To every good warranty in deed that must bar and bind, these things are requisite"—among others—" that the estate to which the warranty is annexed be such an estate as is able to support it ; and therefore that it be a *lease for life* at the least." In *Wotton v. Hele*, 2 Saund. 177, it was held that a warranty by baron and feme, annexed to an estate for years, in a fine, will bind the feme, though under coverture at the time ; and an action of covenant will lie against the feme thereon after the death of the baron. The same doctrine is laid down in Bacon's Abridgment, tit. *Covenant*, (C), pl. 4.

2. This is clearly therefore an express covenant. In Sheppard's Touchstone, ch. 7, § 6, p. 167, it is laid down that " a warranty in a lease for years shall be taken for a covenant for quiet enjoying." *Swan v. Stranham*, Dyer, 257 a, and *Broderidge v. Windsore*, there cited, are also authorities to that effect.

3. It will probably be contended on the other side, that the word "term" here means "estate." In Co. Litt. 45 b, Lord COKE thus defines a "term :"(a)—*Terminus*, in the understanding of the law, doth not only signify the limits and limitation of time, but also the *estate* and *interest* that passeth for that time. As, if a man make a lease for twenty-one years, and after make a lease to begin *à fine et expiratione prædicti termini xxi. annorum dimiss.*, and after, the first lease is surrendered, yet the second lease shall begin presently ; but, if it had been to begin *post finem expirationem prædicti xxi. annorum*, in that case, although the [*417 first term had been surrendered, yet the second lease should not begin till after the twenty-one years be ended by effluxion of time : and so note the diversity between the *term* for twenty-one years, and twenty-one years." So in *Wright d. Plowden v. Cartwright*, 1 Burr. 282, upon a reference being made in the argument to Sheppard's Touchstone, ch. 14, § 3, p. 274, where it is said, that, " if a lease be made to A. for eighty years, if he live so long, and, if he die within the said *term* or alien the premises, that then his estate shall cease ; and then he doth further, by the same deed, grant and let the premises for so many years as shall then remain unexpired after the death of A. or alienation, to B. for the residue of the said *term* of eighty years, if he shall live so long ; in this case, the lease to B. is void ; for, after the death of A. the term is at an end ; but, if he say ' for the residue of the eighty years,' it is otherwise." Lord

(a) And see 5 M. & G. 20.

MANSFIELD observed: "The distinction just cited from Sheppard, (which he takes from the Rector of Chedington's case,) makes no difference, if the word 'term' may signify the *time*, as well as the *interest*; for, then it becomes merely a question of construction,—which sense the word ought to be understood in." The court will therefore put such construction upon the word as will make the whole instrument consistent. In *Evans v. Vaughan*, 4 B. & C. 261, 6 D. & R. 349, A., being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. A. afterwards granted a lease of part of the estate in question, for the lives of three persons therein named, and the life of the

*418] survivor; and there was a covenant that "the lessee should quietly hold and enjoy the premises *for and during the said term*, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease, being for three lives absolutely, was not conformable to the power, and became void on the death of A.; his eldest son brought an ejectment and evicted the lessee, two of the *cetteux que vies* being then living: and it was held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment; and that, by the words *during the said term* in that covenant, the parties intended, a term to continue so long as any of the *cetteux que vies* survived, and not a term to continue only for the life of the grantor. The only distinction between that case and the present is, that there the interest of the lessor was that of tenant for life under a settlement of his own creation: in all other respects the cases are identical. It is clear, therefore, that this is a covenant for quiet enjoyment that enures to the end of the term intended to be granted, viz., ninety-nine years, if the three persons named in the lease should so long live. If the language of the lease were doubtful, the maxim would apply, *Verba chartarum fortius accipiuntur contra proferentem*.

4. The executors of the lessor are bound by his express covenants, whether named or not. In the case of *Lady Cavan v. Pulleney*, 2 Ves. jun. 544, it was assumed that the executors would be liable in damages in such a case as the present. [MAULE, J. Here, the heirs being named, and the executors not, it may be contended that the latter were intended to be excluded.] In *Hyde v. Skinner*, 2 P. Wms. 197, Lord MACCLESFIELD says: "The executors of every person are implied in himself, and bound without naming." And in Comyn's Digest, title *Covenant*, (C. 1),

*419] it is said: "If a man covenants with B., and dies, an action lies against his executor or administrator upon it, though he be not named in the covenant. So, in all cases, an executor is bound by a covenant, if it does not determine by the death of the covenantor. So, if he covenants for him and his assigns: for, an executor or administrator is

an assignee.”(a) The same law is laid down in Brooke’s Abridgment, *Covenant*, pl. 11, 50. So, in Sheppard’s Touchstone, ch. 7. § 9, p. 179, it is said, that, “if one demise a house and land, with a stock or sum of money, for years, rendering rent, and the lessee doth covenant for him and his assigns to deliver the money at the end of the term; in this case, an assignee shall not be bound by this covenant, as *the executors and administrators of the lessee shall.*”

5. That this is a covenant which runs with the land, and enures to the benefit of the assignee of the term, is clear from the fourth resolution in Spencer’s case, 5 Co. Rep. 17 a, “that, if a man makes a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch; but, if a man makes a lease for years by this word *concessi* or *demtē*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant, for, the lessee and his assignee hath the yearly profits of the land which shall grow by his labour and industry for an annual rent, and therefore it is reasonable when he hath applied his labour and employed his cost upon the land, and be evicted, (whereby he loses all,) that he shall take such benefit of the demise and grant as the first lessee might; and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.”

6. The only remaining question is, whether or not the assignee, or his executor, can sue notwithstanding the eviction did not take place until after the death of the lessor; in other words, whether or not the doctrine of estoppel applies to such a case. In *Evans v. Vaughan*, 4 B. & C. 261, 6 D. & R. 349, ABBOTT, C. J., said: “The lessor says by his deed that the lessee shall have the estate for that period for which he purports to grant it; and it is not open to him, or any person claiming under him, to say that he meant by the words ‘*during the said term,*’ any other term than that which he purported to pass by his deed. I think, therefore, that the term contemplated by the parties to the deed, and mentioned in the covenant for quiet enjoyment, was a term to continue for the three lives mentioned in the lease, and that the representative of the lessor, having evicted the lessee while two of the *cetteux que vies* were living, was guilty of a breach of the covenant for quiet enjoyment.” In *Waller v. The Dean and Chapter of Norwich*, Owen, 136, S. C. 1 Brownlow & Goldsb. 21, in an action of covenant, the plaintiff declared on a lease made from the dean: and the case was thus:—The dean, in the 38 Eliz., had made a lease for ninety-nine years to one Themilthorpe, and then in the 42 Eliz. made a lease to the plaintiff for three lives, rendering rent, with a letter of attorney to make livery, and a covenant to save the plaintiff harmless against Themilthorpe: afterwards the attorney makes livery, viz. after Michaelmas, which was a rent day, and he, being disturbed by Themilthorpe, brought this covenant: and one question was, whether, inasmuch as the lease was void to Waller,

(a) Vide 3 M. & G. 287.

the covenant was void also. And it was said by NICHOLLS, J., and agreed by the rest of the justices, that "the covenant is good, and yet in force; for, when an estate is created in which is implied a covenant in law, there, if the estate be void, the covenant is void also; but, when there is an express covenant in deed, there it is otherwise, although the *421] lease be void or voidable; as, if he covenant *that the lessee shall enjoy during the term, and the lessee resign, yet is the covenant good, although the term is gone." It is therefore submitted, that it is not competent to the executors in this case to say that the covenant is void at law. Besides, this is not merely a covenant for quiet enjoyment, but for title also; and, if so, it was broken before the death of the lessor; and no difficulty can arise as to the statute of limitations, the breach being a continuing breach; *Kingdon v. Nottle*, 4 M. & Selw. 53.

As to the damages, the plaintiff is entitled, in both cases, to all the damages claimed, interest only excepted.

Channell, Serjt., (with whom were Sir *T. Wilde*, Serjt., and *Hugh Hill*,) for the defendants. It is agreed on both sides that a warranty, in its strict legal sense, cannot attach to a chattel interest. The reason appears in Co. Litt. 389 a, where it is said: "A warrantie doth not extend to any lease, though it be for many thousand years, or to estates of tenants by statute staple, or merchant, or *elegit*, or any other chattel, but only to freehold or inheritances, as it appeareth in all Littleton's cases which he putteth in this chapter. And this is the reason that, in all actions which lessee for years may have, a warrantie cannot be pleaded in barre; as in an action of trespass, or upon the statute of 5 R. 2, and the like. But, in those actions when the freehold or inheritance do come in question, there the warrantie may be pleaded: but, in such actions which none but a tenant of the freehold can have, as, upon the statute of 8 H. 6, assize, or the like, there a warrantie may be pleaded in barre." It will not be denied that this is, in a certain sense, a covenant: (a) but the question is, *422] whether it is an *express* covenant, or only a covenant in *law. In Sheppard's Touchstone, ch. 7, § 1, p. 163, the rule is laid down, that, "if a man make a lease for years, and warrant it to the lessee, his heirs and assigns, during the term, or he that hath right to the land confirm the estate of the lessee for years, with warranty; in these cases howbeit this be not a warranty, nor in the nature of a warranty, yet it shall be construed a good *covenant in law* for the quiet enjoying of the thing." And therewith agrees *Wotton v. Hele*, 2 Saund. 177. In Rolle's Abridgment, *Covenant* (C) pl. 2, it is said: "Si lessee pur ans covenant a repairer, &c., provided always, and it is agreed, that the lessor shall find great tumber, &c.; ceo faire un covenant del part de lessor, a trover grand tumber, per le paroll agreed, et ne serra un qualification del covenant dellessee." In *Adams v. Gibney*, 6 Bingh. 656, 4 M. & P. 491, tenant for life, remainder over, by indenture demised to the lessee, his executors, &c.

(b) See Com. Dig. tit. *Covenant* (A. 4.)

for the term of fifteen years, without any express covenant for quiet enjoyment; the lessee was evicted by the remainder-man after the death of the tenant for life, but before the expiration of the fifteen years: and it was held that the lessee could not maintain an action of covenant against the executor of the tenant for life in respect of such eviction. All the authorities, and especially *Hyde v. The Dean and Canons of Windsor*, Cro. Eliz. 552; *Bragg v. Wiseman*, 1 Brownlow & Goldsb. 22; and *Swan v. Stransham*, Dyer, 257 a, 1 Anderson, 12, Sir F. Moore, 74, were there cited and very elaborately discussed; and TINDAL, C. J., in delivering the judgment of the court, said: "That the word 'demise' in a lease for years imports and makes a covenant in law for quiet enjoyment by the lessee, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities, *and is admitted by [423 the defendant; but it is contended on his part, that such implied covenant ceases with his estate, as well upon the ground that it is rather in the nature of an implied warranty than of an implied covenant, as upon the direct authority of decided cases. If it had been necessary to determine this case upon the ground of distinction above referred to, considerable doubt would be thrown upon such distinction in the case of a chattel real, by the authority of Lord Coke, by whom it is laid down,(a) that a warranty cannot be annexed to chattels real or personal; but, if a man warrant them, *the party shall have covenant*. We think, however, it is sufficient to say that the cases which have been decided on the precise point now raised are too strong to get over. Such is the case in *Dyer*,(b) determined in Michaelmas term, 8 & 9 Elizabeth. The lease in that case, as in the present, was by indenture made by tenant for life by the word 'demise.' The *ouster* in that case, as in this, was by the remainder-man after the death of the tenant for life, and before the effluxion of the term. The action in that case also, as in this, was an action against the executors of the lessor, to recover damages for the breach of covenant.(c) And, after two arguments, it was held in that case by three of the justices 'that the executors should not be charged with this covenant in law; because the covenant in law ends and determines with the estate and interest of the lessor;' also 'that no cause of action is given against the testator in his lifetime.' And, although one of the justices differed from the rest, yet he admitted that, if the lease had been by deed-poll instead of by indenture, he should have *agreed with his companions: a distinction [424 which is not assented to by the learned reporter. The same principle is laid down in *Hyde v. The Canons of Windsor*, Cro. Eliz. 552, and in the case of *Bragg v. Wiseman*, 1 Brownl. & Goldsb. 22, where covenant was brought against the executor of the husband upon a lease by husband and wife; and it is laid down 'that a covenant in law shall

(a) Co. Litt. 101 b, 384 a; Hargrave and Butler's Notes, 332.

(b) *Swan v. Stransham*, Dyer, 257 a.

(c) See the form of the declaration, Bendloes, 150.

not be extended to make one do more than he can, which was, to warrant it as long as he lived, and no longer.' ” The only authority that militates against the argument now urged is the *obiter dictum* above referred to in *Sloan v. Stransham*, Dyer, 257 a. Had the covenant in this case been an *express* covenant, it may be conceded that the word “term” would have borne the construction in support of which reference has been made to *Wright d. Plowden v. Cartwright*, 1 Burr. 282. *Evans v. Vaughan*, 4 B. & C. 261, 6 D. & R. 349, has no application; that was clearly the case of an express covenant. All that the passage cited from *Spencer’s* case, 5 Co. Rep. 17 a, amounts to is this, that, in some respects, the assignee stands in the same position as the lessee; whereas the contention in the present case is, that neither lessee nor assignee could sue in respect of breaches in the time of the lessor. *Andrew v. Pearce*, 1 New Rep. 158, shows that, to entitle the assignee to sue, there must be an actual assignment of a valid and subsisting lease: here, the second lease was at an end before the assignment. *Waller v. The Deane and Chapter of Norwich*, Owen, 136, (a) was also the case of an express covenant. NICHOLLS, J., took the view that is now presented, observing, that, “when an estate is created in which is implied a *covenant in law*, there, if the estate be void, the covenant is void also:” and the report concludes—“And *425] the *court agreed with Nicholls.” *Kingdon v. Nottle*, 4 M. & Sel. 53, was also the case of an express covenant: had it been otherwise, the point for which it was cited could not have arisen. The argument now urged is clearly put in Sheppard’s Touchstone, ch. 7, § 8, p. 178: “If a lessee be ousted by one that hath title, it seems an action of covenant will lie for this ouster against the executor or administrator, upon the covenant in law, if he were put out in the lifetime of the lessor, and not otherwise; for, if there be tenant for life, the remainder in fee to another, and the tenant for life, by the words ‘demise or grant,’ doth make a lease for years, and die, and after he in remainder doth enter and put out the lessee for years; in this case, he cannot, upon this covenant in law, charge the executors or administrators of the lessor.”

An assignee can only sue by reason of some privity of estate: it is, therefore, incumbent on him to show a breach whilst such privity is subsisting: *Andrew v. Pearce*, 1 New Rep. 158.

If the plaintiff is entitled to recover, he may be entitled to recover in respect of the mesne profits; but clearly he is not entitled to the costs now claimed. As a general rule, it is well established that a party has no right to defend an action where there is no valid defence, and then throw the liability to the costs thus wantonly incurred (b) upon persons who have entered into some covenant or agreement of indemnity.

Byles, Serjt., in reply. It is not necessary to dispute the doctrine laid

(a) *Waller v. Dean, &c. of Norwich*, 1 Brownlow & Goldsb. 21.

(b) *Vide infra*, 410, *infra*, 433.

down by this court in *Adams v. Gibney*, 6 Bingh. 656, 4 M. & P. 491, viz., that the covenant implied from the word "demise" extends no further than the estate of the lessor. That a covenant for quiet enjoyment, as well as "a covenant for title, is implied under the word "demise," is clear from *Holder v. Taylor*, Hobart, 12; *Fraser v. Skye*, [426 2 Chitt. Rep. 646; *Iggulden v. May*, 9 Ves. 325; and *Burnett v. Lynch*, 5 B. & C. 589, 8 D. & R. 368. The real question is, whether the covenant in the present case is an express covenant or merely a covenant in law. If it had not been intended by the parties for an express covenant, it would not have found any place in the indenture at all. [MAULE, J. If it means any thing more than is implied in the word "demise," it must be an express covenant.] The authorities already cited show that it may be an express covenant, though it mean no more than the law implies from the word "demise:" and those authorities are not in the slightest degree impugned by any thing that has been urged on behalf of the defendants. In *Williams on Executors*, 3d ed. p. 1352, it is said: "It is clear that in many cases a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein. Thus, the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator.(a) So, where a man covenanted that A. should serve B. as an apprentice for seven years, and died, it was holden, that, if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming(b) him.(c) So, if A. is bound to build a house for B. *before such a time, and A. dies before the time, his executors are [427 bound to perform this contract.(d) Hence it appears that executors or administrators more actually represent their testator or intestate than the heir does the ancestor: for, if a man binds himself, his executors or administrators are bound though not named; but it is not so of the heir, however large an amount of real assets may have descended to him."(e) The defendants having sanctioned the defence of the ejectments, it does not lie in their mouths to say that the costs thereby incurred were unnecessarily or wantonly incurred. [ERLE, J. The question in these cases is, whether or not the defence is such as a prudent man might be expected to set up.] If that be the test, the plaintiff's right to recover these costs is indisputable.

(a) Citing *Toller*, 463, where the reference is to *Com. Dig. Pleader*, (3 D. 3), from which the reference is to *Dyer*, 344 b.

(b) i. e. although there is no mention of executors in the covenant, or as Lord Brooke has it, "ou executor n'est mencion en le fait." *Bro. Abr. Covenant*, pl. 12.

(c) Citing *Bro. Abr. Covenant*, pl. 12, which refers to 48 E. 3, (H. 48 E. 3, fo. 1, pl. 4.) The same case is referred to in *Bro. Abr. Executors*, pl. 142; *Bac. Abr. Executors*, (P.) 1, referring to *Br. Abr. tit. Cov.* pl. 12.

(d) Citing *Quick v. Ludburrow*, 3 Bulstr. 29; *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. Ch. Cas. 581.

(e) Citing *Co. Litt.* 209 a; *Wentw. Off. Ex.*, 14th edit. c. 11, pp. 239, 240.

the sense and meaning of the words employed by the parties in the deed. In some cases, that meaning is more clearly expressed, and therefore more easily discovered; in others it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause; in others, it is only to be made out by the comparison of different and perhaps distant parts of the same instrument.

*431] *But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning is to be entirely disregarded; the legal effect and operation of the covenant, whether framed in express terms, that is whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant. Now, it is in this sense that the counsel on the part of the defendants appear to have used the term "implied covenant." The covenant for quiet enjoyment, they contend, is an implied covenant, because it is found in the deed in the form of a warranty, and not in that of an express covenant for quiet enjoyment: and they then further contend, that, being an implied covenant, it must of necessity be a covenant in law. To which it appears to us to be a sufficient answer, that an implied covenant, in the sense in which the phrase is used in the argument, is to all intents and purposes the same as an express covenant; and that it is only those covenants which the law itself implies, that can be properly considered as covenants in law—a character and description which, as we have already seen, does not belong to the covenant now under discussion. And, upon considering the several authorities referred to, they will be found in accordance with this view of the case. In *Swan v. Stransham*, Dyer, 257 a, though it was held, on a demise for years by a tenant for life, who died during the term, that an action of covenant could not be maintained on the covenant in law against the executors of the tenant for life, because the covenant in law ends and determines with the estate and interest of the lessee; yet it was said, that, if there had been a covenant in fact or expressed, or warranty of the term expressed, it should be otherwise. So, in *Pincombe v. Rudge*, Hob. 3, Yelv. 139, 1 Roll. Rep. 25, Noy, 131, a warranty is called a covenant real (a) when it is annexed to a freehold, and a freehold is in question, but a covenant personal when a chattel interest only is in question. And this case is referred to for this distinction, in 1 Rolle's Abridgment, 519, 6 Vin. Abr. 378, pl. 9, where the personal covenant of warranty when a chattel interest is in question, is classed under express covenants, and not under covenants in law, or under implied covenants.

(a) i. e. a personal covenant relating to, and binding, the reality, not a true covenant real upon which a fine might be levied. See F. N. B. 145, A, 146, F., Com. Dig. tit. Covenant

In *Wotton v. Hele*, 2 Saund. 177, 1 I.ev. 301, 1 Sid. 466, 2 Keb. 684, an action of covenant for quiet enjoyment was held to be maintainable upon a warranty of a term of years in a fine; but there is no discussion in that case as to the covenant being express, or a covenant in law. In Comyn's Digest, *Covenant*, (A. 3), a warranty annexed to a chattel interest is indeed classed under the head of covenants in law, as distinguished from express covenants; but the only authorities referred to are, *Wotton v. Hele*, which does not bear on the point, and *Pincombe v. Rudge*, in Rolle's Abridgment, where the same covenant is classed as an express covenant. And, where in Sheppard's Touchstone, ch. 7, § 4, p. 163, it is stated, that a warranty annexed to a chattel interest will operate not as a warranty, but as a covenant in law, the author was adverting to the distinction, not between express covenants and covenants in law, but to that between warranty in a stricter sense, and a covenant personal.

The other cases cited in the course of the argument, from *Swan v. Stransham* to *Adams v. Gibney*, bear *on the question of liability [433 in respect of a covenant in law, not on the question whether an express warranty is a covenant in law only. Therefore, both upon principle and authority, we think this is an *express* covenant for quiet enjoyment, which extends to the term purported to be granted, and consequently that the defendants are liable thereon as executors of the covenantor.

As to the question arising on the second lease, we think that the executor of the assignee of the lessee has the same right of suing on this covenant as the original lessee.

In Spencer's case, 5 Co. Rep. 16 a, fourth resolution, it was held that a covenant in law for title would pass with the estate; and there is neither principle nor authority to show that an express covenant, either for title or quiet enjoyment, will not equally pass, and be available for the assignee of the lessee, or the executor of such assignee.(a)

And, although in *Andrew v. Pearce*, 1 New Rep. 158, it was held that no action was maintainable upon the covenant for quiet enjoyment by the assignee of the lessee against the executor of the lessor; yet that was expressly on the ground that the lease had become absolutely void by the death of the lessor before the assignment made to the plaintiff; a fact which does not occur in the present case.

The amount of damages only remains to be settled. As to the mesne profits, and the value of the term lost, the liability of the executors is too clear to require discussion. We think, also, that the present defendants are bound to pay the costs of the present plaintiff in defending the actions of ejectment; because the present defendants, by directing a defence,(b)

(a) Vide *Wollaston v. Hakewill*, 3 Mann. & Gr. 297, 3 Scott, N. R. 593.

(b) The statements in the special case upon this point, *supra*, 410, appear to be somewhat inconsistent.

*434] admitted that there *was reasonable ground for defending; and, from the statement, it appears that the costs in question were necessary for such defence. But we see no ground for the allowance of interest on any of the sums.

We shall certify accordingly, to the Master of the Rolls.

The following certificate was afterwards sent :—

“First: We are of opinion that the said John Williams is entitled to recover from the said defendants, as executors as aforesaid, each of the said sums of 13*l.* 16*s.* 1*d.*, and 24*l.*, and 75*l.*, but without interest:

“Secondly: We are of opinion that the said John Williams, as such executor as aforesaid, is entitled to recover from the said defendants, as executors as aforesaid, the said sums of 14*l.*, 25*l.*, and 80*l.*, but without any interest.

“N. C. TINDAL,

“THOMAS COLTMAN.

“W. H. MAULE.

“W. ERLE.”

END OF HILARY VACATION.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
UPON WRITS OF ERROR FROM THAT COURT
TO THE
EXCHEQUER CHAMBER,
IN
Easter Term,
IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco in this term were,

TINDAL, C. J.

CRESSWELL, J.

COLTMAN, J.

ERLE, J.

DAVIES, Dem., WILLIAM SELBY LOWNDES, Ten. *April 15*

Appearance of the knights to choose the recognitors for the trial of a writ of right.

THE court of Exchequer Chamber having awarded a *venire de novo* in this writ of right, (see 6 Mann. & Gr. 474, 7 Scott, N. R. 141; and this court having on a former day (in Michaelmas term last) granted a rule for a trial at bar,) a writ of summons issued to the sheriff of Buckinghamshire, commanding him to summon four knights of the shire to choose the recognitors. The knights not appearing at the return of the writ, their default was recorded, and an *alias* writ of *summons issued, [436 directing the sheriff to bring up other four knights.

On the 20th of January last, three of the knights last summoned, viz., R. W. H. H. Vyse, Esq., C. Clowes, Esq., and J. P. Deering, Esq., appeared, but the fourth, G. Penn, Esq., made default; whereupon the appearance of the three knights, and the default of the fourth, were recorded, and a *pluries* writ of summons issued, commanding the sheriff to bring up *other four* knights.

On this day the four knights last summoned, viz., J. P. Deering, Esq., W. Jenney, Esq., W. P. W. Freeman, Esq., and R. J. Freer, Esq., appeared, and were duly sworn to choose the recognitors. Having retired for this purpose, they returned into court with a list of twenty-four,^(a) themselves included: and a day was afterwards appointed for the trial.^(b)

(a) The proper number would appear to be sixteen.

(b) *Quere*, whether the knights were properly summoned in this case by *alias* and *pluries* writs of summons. In the case of *Lord Windsor v. St. John*, Dyer, 79 b, "the writ of summons of four knights, girt with swords, was returned served, and there appeared but two of the knights; and, by the opinion, a *habeas corpora* shall be awarded to the sheriff to have them in the octaves of Trinity; and the precedent of 17 H. 8 agrees with this: and no *alias* summons shall be awarded." Afterwards, in the same case, Dyer, 103, four knights were returned, and appeared, and one was challenged, and withdrew; a new summons was awarded to summon another, and a *habeas corpora* against the others. And see Booth, Real Actions, 97, where it is said, upon the authority of the above case in Dyer, 79 b, that, "if four knights do not appear, but some of them, a *habeas corpora* shall issue to the sheriff, and no *alias* summons."

In Brownlow's Writs Judicial, p. 143, is a form of a writ of summons commanding the sheriff to summon one knight, (one of those already summoned having made default,) and a *distingas* to compel the appearance of the other three.

But, by consent, the twelve may be elected by those who do appear. Glanvill, lib. 2, c. 12.

See Dyer, 270 b, for the process to bring in the sixteen named by the knights, which is a *venire facias*.

*437] *In the Matter of SARAH WOODCOCK. April 15.

The concurrence of the husband in a conveyance by his wife of her separate property, under the 3 & 4 W. 4, c. 74, s. 91, will be dispensed with, where the parties are living apart by mutual consent, and the husband refuses to join in the execution unless part of the purchase money is paid to him.

CLARK, Serjt., moved for a rule to enable Sarah Woodcock, a married woman living apart from her husband, to convey her interest in certain freehold property at Coventry. The motion was founded upon the affidavit of the wife, which stated that she was married to Thomas Woodcock on the 25th of December, 1827, and that they lived together for about eight weeks, and then separated, and had never since lived or cohabited together, but had ever since lived separate and apart from each other, and that she had ever since and still resided at Coventry, and her husband at Hinkley, in the county of Leicester; that she was entitled to the property in question under the will of one James Woodcock, and had contracted to sell the same to one Needham for 45*l.*; and that she had caused an application to be made to her said husband to join with her in conveying the same to Needham pursuant to her said contract: and also the affidavit of a clerk to an attorney, which stated that he called upon the husband, and informed him of his wife's right to the property in question, and that she had contracted to sell it, and asked him if he would join in the conveyance thereof; and that the husband refused to join in, or sign, any deed, unless he received one half of the purchase money. He referred to *Merfin's* case, 4 Mann. & Gr. 635,^(a) where a similar rule

(a) S. C., per *nom.* *Ex parte Murphy*, 5 Scott, N. R. 166.

was granted upon affidavit of the husband's refusal to execute a conveyance.

TINDAL, C. J. The husband's refusal to concur in the conveyance, except upon the terms stated, is a sufficient reason for granting the application. Fiat.

*SMITH v. MOORE and Another. *April 16.* [*438]

The defendants, by public advertisement, offered a reward of 20*l.* to any person who would give such information as should lead to the apprehension and conviction of the party or parties who had broken into, robbed, and set fire to their premises. One B., whom the plaintiff had taken into custody on suspicion of being concerned in the offence, offered to make certain disclosures if furnished with something to eat and drink. The plaintiff communicated this offer to a sub-inspector of police, who took B. to a public-house, and gave him refreshment, whereupon B. made a voluntary confession, which resulted in his conviction and transportation for the crime in question:—*Held*, that the plaintiff was entitled to the reward.

ASSUMPSIT for a reward of 20*l.* offered by the defendants for the discovery of the person or persons who had committed a burglary.

The defendants pleaded, first, non assumpsit: secondly, that the plaintiff did not give such information as led to the apprehension and conviction of the offender; whereupon issue was joined.

The cause was tried before PLATT, B., at the last assizes at Worcester, when the following facts appeared in evidence:—Towards the close of the year 1844, certain premises belonging to the defendants at Tivdale New Colliery, near West Bromwich, in the county of Stafford, were broken into, robbed, and set fire to. The defendants immediately caused hand-bills and placards to be circulated and posted, offering a reward of 20*l.* to any person who would give such information as should lead to the apprehension and conviction of the person or persons who committed the offence. The plaintiff,—who had been a constable belonging to the Staffordshire police, but who was under a temporary suspension from his office,—suspecting a man named Bridges to have been concerned in the robbery, apprehended him, when Bridges volunteered to make some disclosures relative to the affair, if something were given him to eat and drink. Meeting with one Thompson, a sub-inspector of the Staffordshire police force, the plaintiff communicated to him what Bridges had proposed. Thompson thereupon went with the plaintiff and Bridges [*439]
to a neighbouring public-house, when the latter, after having been provided with refreshment, made a voluntary confession as to the share he had had in the transaction in question, which resulted in his conviction and transportation. Thompson who was called as a witness for the plaintiff, stated that he knew nothing of Bridges, in connection with the robbery, previously to the communication made to him by the plaintiff; whereupon the learned judge observed that the cause was an undefended one, and that there was nothing to be left to the jury. A verdict having been found for the plaintiff, damages 20*l.*,

Talfourd, Serjt., now moved for a new trial, on the ground of misdirection. In *Lancaster v. Walsh*, 4 M. & W. 16, a party who had been robbed of bank-notes put forth a hand-bill, wherein it was stated, that "whosoever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of 20*l*." and it was held that the only person entitled to the reward was he who *first* gave information by which the notes were traced to the robbers, so as to ensure their conviction. Here, the question is whether the plaintiff could be said to have been the *first* discoverer of the offender, when the information which led to the conviction of the party was his own voluntary statement.

TINDAL, C. J. I am of opinion that my brother PLATT's direction was perfectly right. The words of the placard offering the reward are large and general enough to comprehend every mode by which information could be conveyed that might have the effect of discovering and convict-
 *440] ing the guilty person. And *perhaps the confession of the party himself is the most satisfactory information that could be obtained, seeing that it is the least likely to be mistaken. I cannot help observing that people are very ready to offer rewards for the discovery of offenders whilst smarting under the loss or injury they have sustained, but are slow indeed to pay them when the claimants present themselves.

The rest of the court concurring,

Rule refused.(a)

(a) See *Williams v. Carwardine*, 4 B. & Ad. 621, 1 N. & M. 418; *Dutton v. Poole*, 2 Lev. 210, 211; *Week v. Tibolt*, 1 Roll. Abr. fo. 6, pl. 31, and 1 Vin. Abr. 261, 333.

COOMBER v. HOWARD. April 19.

By a memorandum in writing, A. agreed to let to B. a house "at a yearly rent of 50*l*," with a proviso that A. should, "in consideration of the yearly rent as aforesaid being duly paid," give B. quiet possession of the said house: and B. agreed "to pay the aforesaid rent of 50*l*, and all taxes," &c. The memorandum then concluded thus—"likewise the stable and loft over, now occupied by H., at a further rent of 25*l*. per annum,—to be paid on the usual quarter days:"—*Held*, by Coltman, Cresswell, and Erie, Js., *absente* Tindal, C. J., that the reservation of quarterly payments applied only to the 25*l*. rent, and not to the 50*l*.

TRESPASS, for breaking and entering a dwelling-house and office of the plaintiff, situate, &c., creating a disturbance therein, and seizing his goods, amongst others, a crane and its appurtenances, which had been fixed on part of the premises.

Pleas, as to all except the crane, &c., not guilty by statute; and payment into court of 35*l*. in respect of the seizure of the crane. Replication, damages *ultra*.

The cause was tried before Lord DENMAN, C. J., at the last assizes for the county of Surrey. It appeared that the plaintiff was tenant to the defendant of the premises upon which the alleged trespass was committed, under the following memorandum:—

*“Memorandum of agreement made and entered into this 5th day of January, 1844, between Mrs. H. M. C. Howard, of, &c., of the one part, and John Coomber, of, &c., of the other part: The said Mrs. H. M. C. Howard agrees to let to the said John Coomber the house and premises below, lately occupied and used as a booking-office by Mr. Gander, situate in the White Hart Inn middle yard, in the parish of St. Saviour's, in the borough of Southwark, at a *yearly rental* of 50*l.*, for the term of three years commencing from Christmas last, and, at the expiration of that term, for a further period of seven, fourteen, or twenty-one years, at the option of the said John Coomber: and the said Mrs. H. M. C. Howard, in consideration of the *yearly rent* as aforesaid being duly paid, further agrees to give the said John Coomber quiet possession of the said house: and the said John Coomber agrees with the said Mrs. H. M. C. Howard to pay the aforesaid rent of 50*l.* for the term of three years from Christmas last, and to pay all taxes, parliamentary and parochial, and keep the house in tenantable repair; likewise the stable and loft over, now occupied by Honey, the late ostler, at a further *rental* of 25*l.* per annum—to be paid on the usual quarter days.”

The action was brought to recover damages by reason of a distress made by the defendant on the 27th of June, 1844, for a half year's rent alleged to be due in respect of the *whole* premises. It appeared that the plaintiff had been let into possession, under the above agreement, of the booking-office, stable, and loft, but that one Dann, who had previously occupied the rooms over the booking-office, under Gander, the former tenant, refusing to quit, the plaintiff had never had possession of those rooms. Evidence was also given on the part of the plaintiff, of injury and loss of business occasioned by the seizure and removal of the crane.

*It was contended on behalf of the plaintiff—first, that the defendant was not entitled to any rent at all, inasmuch as he had not been put in possession of the entire premises—secondly, that the rent reserved by the agreement in respect of the “house and premises,” viz., the booking-office and rooms over, mentioned in the earlier part of the agreement, being by the express terms of the contract payable *yearly*, the distress was premature and unauthorized. [*442]

For the defendant it was insisted, that, by the true construction of the whole agreement, the rent for the booking-office and rooms over, as well as that for the stable and loft, was payable *quarterly*.

His lordship told the jury, that, under the circumstances, the defendant had no right to distrain for the entire rent; and he left it to them to say whether or not the 35*l.* paid into court was a sufficient compensation for the injury the plaintiff had sustained.

The jury returned a verdict for the plaintiff, damages 65*l.* in addition to the sum paid into court.

Channell, Serjt., now moved for a new trial on the ground of misdirection. He submitted, that, although, if Dann had rightfully kept the

plaintiff out of possession of the rooms over the booking-office, it might be difficult to say that the defendant was justified in distraining for the whole rent, still the jury were improperly directed as to the legal effect of the agreement, which he insisted made the entire rent of 75*l.* payable *quarterly*.

COLTMAN, J.(a) I am of opinion that the direction of Lord DENMAN was correct. The first part of the agreement clearly and unequivocally *443] stipulates for a *yearly* rent of 50*l.*(b) for the "house and premises, below lately occupied and used as a booking-office." The rest of the premises are then let by a separate description, and at a separate rent of 25*l.*, which is distinctly reserved to be paid *quarterly*. I see no reason why the parties might not by one agreement let two different sets of premises in this way, at separate rents payable at different periods. I think the first part of the agreement clearly makes the 50*l.* rent payable *yearly*, and that the 25*l.* rent only is payable *quarterly*.

CRESSWELL, J. I am of the same opinion. By the agreement the defendant contracts to let to the plaintiff "the house and premises below, lately occupied and used as a booking-office by Mr. Gander, situate, &c., at a *yearly rental* of 50*l.*;" and then it goes on to provide that she shall, "in consideration of the *yearly rent* as aforesaid being duly paid," give the plaintiff quiet possession of the said house: and the plaintiff agrees with the defendant "to pay the *aforesaid rent* of 50*l.*" Then comes the clause as to the stable and loft—"likewise the stable and loft over, now occupied by Honey, the late ostler, at a *further rental* of 25*l.* per annum, to be paid on the usual quarter days." Here, it is to be observed, the phrase is changed, "*further rental*" being substituted for the expressions in the earlier part of the agreement, "*yearly rental*," and "*yearly rent*." I think the plaintiff by this memorandum clearly undertook to pay the one rent *yearly*, and the other *quarterly*, and not otherwise.

ERLE, J. A *yearly* rent is payable only *once in a year*, unless the reservation be qualified by subsequent words making it payable at shorter intervals. Rule refused.

(a) Tindal, C. J., was attending the argument of the crown jewels' case.

(b) Not payable *yearly*, except in the absence of an express reservation.

*444] *MANTON and Others v. BALES. April 21.

Case of an injury to the plaintiff's reputation, by the sale by the defendant of gun-locks of an inferior fabric, with the name of the plaintiff stamped thereon. The jury having returned a verdict for the defendant, upon an issue on damages, *ultra* 5*l.* paid into court, on the ground, that the sum paid into court covered the pecuniary damage actually sustained by the plaintiff, the court, on an application for a new trial, declined to interfere.

CASE, by gun-smiths of celebrity against the defendant, for fraudulently marking and selling gun-locks with figures, letters, &c. resembling the

figures, letters, &c. of the plaintiffs, whereby the plaintiffs were deprived of certain profits, and injured in their reputation as gun-makers.

The defendant pleaded, first, except as to four gun-locks, not guilty; secondly, except as before excepted, that the plaintiffs did not make and sell guns, &c., as in the declaration mentioned; thirdly, payment into court of 5*l*.

The plaintiffs joined issue upon the first and second pleas, and to the third replied damages *ultra*.

At the trial before TINDAL, C. J., at the sittings at Westminster after the last term, it was proved that the defendant had made four gun-locks upon which the name of the plaintiffs appeared as the makers: but the sale of one pair only was proved. It appeared that the profit upon the sale of gun-locks varied from 3*l*. to 6*l*. per pair.

The jury returned a verdict for the defendant.

Sir T. Wilde, Serjt., now moved for a new trial, on the ground that the jury had adopted an improper mode of estimating the injury of which the plaintiffs complained, which was, not simply that they had been deprived of the profit upon the sale of so many locks as they could show the defendant to have sold with their names stamped on them, but that their reputation was seriously affected by the sale of a spurious and inferior article with a false representation that it was of their manufacture.

TINDAL, C. J. This case appears to me to fall within the principle of those in which the courts have invariably refused to disturb verdicts on the ground of the inadequacy of the damages. Here the jury have virtually estimated the injury of which the plaintiff complains at 5*l*., which, according to the well-known rule, precludes our interference with the verdict as being against evidence: and this is but the same motion in a different shape. I admit the importance to a manufacturer that he should be protected against a fraud of this description; but, regard being had to the rules by which we are governed in these cases, I think we cannot accede to the present application. [*445]

The rest of the court concurred.

Rule refused.(a)

(a) See *Gibbs v. Tunnailey*, post.

MOORE v. DARLEY. April 21.

It is no excuse for not applying within the proper time to set aside an award, that the party had been prevented from obtaining a knowledge of its contents by the arbitrator's improperly demanding an extortionate sum for his fees.

THIS cause and all matters in difference between the parties were referred to lay arbitrators, who made their award before Hilary term last, and gave notice to the parties that it was ready to be delivered to them, or either of them, on payment of 15*l*. for their expenses. The plaintiff,

conceiving this to be a grossly extortionate demand, declined to take up the award. The defendant, however, took it up, and gave the plaintiff notice of its contents on the last day of Hilary term. By the award, the plaintiff was ordered to pay to the defendant 44l.

Sir T. Wilde, Serjt., was now instructed to move, on the part of the plaintiff, to set aside the award. He *relied upon the above facts as an excuse for the lateness of the application; citing *Reynolds v. Askew*, 5 Dowl. P. C. 682, for the purpose of showing, that, in a case not within the statute 9 & 10 W. 3, c. 15, the court will relax the severity of the rule, provided the circumstances will warrant it, though in general they will adopt that rule as a guide to their discretion. [TINDAL, C. J. In *Potter v. Newman*, 2 C., M. & R. 742, Tyrwh. & Gr. 29, 4 Dowl. P. C. 504, these cases are all put upon the same footing.] It would be a grievous hardship on the plaintiff to be deprived of an opportunity of moving to set aside the award, by the misconduct of the arbitrators in withholding it until payment of so exorbitant a charge. [TINDAL, C. J. In *McArthur v. Campbell*, 2 Nev. & M. 444, 5 B. & Ad. 518, the court of King's Bench held a similar excuse insufficient. And we came to the same determination in the subsequent case of *Musellbrook v. Dunkin*, 9 Bingh. 605, 2 M. & Scott, 740, 1 Dowl. P. C. 722. There, a cause was referred at the assizes (without a verdict being taken) to a layman. The arbitrator on the 19th of May gave notice to the parties that his award was ready to be delivered to them, on payment of certain fees, which were deemed exorbitant. In Trinity term following, the court made a rule absolute for referring the arbitrator's charge to the prothonotary for taxation. The prothonotary, after the expiration of the term, proceeded with the taxation, and reduced the fees. The defendant on the 24th of November paid those fees, and obtained the award. On the 26th, the last day of Michaelmas term, the plaintiff moved to set aside the award. And it was held that the application was too late. CRESSWELL, J. The plaintiff might have applied to the court in Hilary term to refer the arbitrators' charge to the master for taxation, as appears to have been done in the case last cited.] *The case is one of great hardship on the plaintiff, whose conduct throughout has been perfectly *bond fide* [CRESSWELL, J. The defendant might with equal *bond fides* have declined to take up the award until after the expiration of the time for moving to set it aside. The plaintiff is seeking to take advantage of a payment made by the defendant, which he did not choose to make himself.] TINDAL, C. J. The cases are so very strong against the application, that I think it would be a useless waste of expense to grant a rule.

The rest of the court concurring,

Sir T. Wilde took no rule.(a)

(a) See *Dosselt v. Gingell*, 3 Mann. & Gr. 870, 3 Scott, N. R. 179, where it was held that the court has no general jurisdiction over arbitrators as to the amount of fees charged by them, whether the reference be under a rule of court or not.

In the Matter of the Wife of GEORGE APPERTON. *April 22.*

The court allowed a commission for taking the acknowledgment of a deed by a married woman at Sydney, in New South Wales, to go out with a blank for her Christian name.

TALFOURD, Serjt., moved that a commission might be permitted to go to commissioners for the purpose of taking the acknowledgment of a deed by a married woman at Sydney, New South Wales, a blank being left therein for her Christian name, which, the marriage having taken place at Sydney, was not known to any person here. The difficulty arose from the eighty-third section of the 3 & 4 W. 4, c. 74, which authorizes this court, or any judge thereof, "to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment of any *married woman, *to be therein named*, of any such deed as aforesaid." [TINDAL, C. J. The case is not free from difficulty, inasmuch as the name of baptism is the only indelible name of the party.] The lady will, of course, make the conveyance by her proper name; the blank will appear only in the commission. [*448]

Per curiam. Upon consideration, we think it not unreasonable that the commission should go in blank, as prayed. Care must, however, be taken that the party is identified by proper affidavits when the commission is returned. Fiat.

DOE dem. STEVENSON v. GLOVER. *April 23.*

A. devised his copyhold and real estates to B. his heirs and assigns; but, in "case B. shall depart this life without leaving any issues of his body lawfully begotten then living, or being no such issue and B. shall not have disposed and parted with his interest of, in, and to the said copyhold estate," then he devised the same unto and to the use of C., her heirs and assigns; —Held, that the limitation over to C. was valid, and took effect on the death of B. without issue, and without having parted with his interest by surrender or by deed in his lifetime, and that a testamentary disposition by A. was inoperative.

THIS was an action of ejectment, brought to recover a close, with the appurtenances, which, before and at the several times hereinafter mentioned, and also from time whereof the memory of man is not to the contrary, had been and was within and parcel of the manor of Woodborough, in the county of Nottingham, and a customary tenement thereof; and in which manor customary tenements had been, for all the time aforesaid, devisable by last will and testament, and descendible from ancestor to heir.

Mordecai Glover, the father, before and at the time of making his last will and testament hereinafter mentioned, and from thence until and at the time of his *death, was seised of and in the said close, with the appurtenances, of his customary estate, and which was de- [*449] scendible and devisable as aforesaid; and the said Mordecai Glover,

being so seised as aforesaid, after having duly surrendered the said close, with the appurtenances, to the use of his will, did, on the 8th of May, 1802, duly make and publish his last will and testament in writing, duly executed and attested as by law required to pass real estates, and did thereby, amongst other things, give and devise the said close, with the appurtenances, amongst other premises, as follows, and by the following description, that is to say, "I give and devise unto my dear wife, Anna Glover, all those my customary or copyhold messuages, cottages, lands, tenements, hereditaments, and real estates, whatsoever, situate and being in the parish of Woodborough aforesaid, (meaning the parish of Woodborough in the county of Nottingham, and meaning, amongst other premises, the said close with the appurtenances,) or elsewhere in the United Kingdom of Great Britain and Ireland: to hold the same unto my said wife, Anna Glover, and her assigns, for and during the term of her natural life; and, from and immediately after her decease, then I give and devise all and singular my aforesaid messuages, lands, tenements, hereditaments, and real estates whatsoever, unto my son, Mordecai Glover, and his heirs and assigns for ever: to hold to him and to his heirs and assigns for ever; but, in case my said son, Mordecai Glover, shall happen to depart this life without leaving any issue of his body lawfully begotten then living, or being no such issue, and he my said son *shall not have disposed and parted with* his interest of, in, and to the aforesaid copyhold estate and premises, then and in such case, I give and devise the same customary or copyhold messuages, cottages, lands, tenements, hereditaments, and real estates unto, and to the use of, my illegitimate *450] daughter Ann Stevenson, the wife of John Stevenson, of Epperstone, in the said county of Nottingham, farmer, late Ann Bradley, (the daughter of Anna Bradley,) and * of her heirs and assigns for ever."

The said Mordecai Glover, the father, shortly after making his said will, died without revoking or altering his said will, leaving his said son, Mordecai Glover, and the said Ann Stevenson, him surviving; which said Anna Glover, upon his death, became entitled to, and entered upon, the said close, with the appurtenances, by virtue of, and according to, the said devise thereof to her, and continued possessed of, and held and enjoyed, the same by virtue of the same devise until her death, which took place in the year 1824.

Upon the death of the said Anna Glover, and in or about the year last aforesaid, the said Mordecai Glover, to whom the said close was devised as aforesaid,—and who is hereinafter described and referred to as and by the description of Mordecai Glover the son—became entitled to, and did enter upon, the said close, with the appurtenances, and afterwards, on the 5th day of April, 1825, was duly admitted tenant of the said close, with the appurtenances, according to the custom of the said manor, and from thence until and at the time of his death was tenant of the said close, with the appurtenances, and seised thereof, as of his customary

estate: and such admittance of the said Mordecai Glover the son was in the words following:—

“The manor of Woodborrow, to wit.—The view of frank-pledge with the customary or copyhold court and court-baron of the Rev. E. G. Marsh, clerk, prebendary of the prebend of Woodborrow aforesaid, holden at Woodborrow, in and for the said manor, the 5th day of April, in the sixth year of the reign of our sovereign lord George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, *defender of the faith, and in the year of our Lord, 1825, before [*451 G. H. Barrow, Gent., one of the stewards of the manor aforesaid. To this court cometh Mordecai Glover, of Woodborrow, in the county of Nottingham, farmer, the only son and customary heir, and also devisee in fee in remainder, named in the last will and testament, of Mordecai Glover, late of Woodborrow aforesaid, farmer, deceased, (here in court produced and allowed, and amongst the court-rolls of this manor enrolled,) in his proper person, and here in full and open court, doth humbly pray to be admitted tenant to all and singular the customary or copyhold messuages, cottages, closes, lands, tenements, and hereditaments whatsoever, situate and being in the parish of Woodborrow aforesaid, or elsewhere within the said manor, which were given and devised to him the said Mordecai Glover the son, his heirs and assigns for ever, after the decease of Anna, the widow of the said Mordecai Glover, both deceased, in and by the said will of the said Mordecai Glover, the father, deceased, or which descended and came, or ought to have descended and come, to him the said Mordecai Glover the son, by and immediately after the death of his said father, the said Mordecai Glover, deceased; together with all and every the rights, members, and appurtenances thereto belonging. And hereupon the lord of the manor aforesaid, by the steward aforesaid, granted seisin of the same premises unto the said Mordecai Glover the son, by the rod, according to the custom of the said manor: to have and to hold to him the said Mordecai Glover the son, his heirs and assigns, for ever, according to the same custom, of the lord of the said manor and his successors, by the rents, customs, and services therefore due and of right accustomed: and he giveth to the lord for a fine for such his estate and ingress so thereof had, 2s. 11d.; and so is admitted tenant in the form aforesaid.”

*The said Mordecai Glover the son, after he had been admitted as aforesaid, and while he was seised of the said close, [*452 with the appurtenances, as aforesaid, did, on the 16th of July, 1841, duly make and publish his last will and testament in writing, duly executed as by law required to pass real estates; and did thereby give and devise the said close, with the appurtenances, amongst other things, as follows, and by the following description, that is to say—“I give and devise all my freehold and copyhold messuages, lands, hereditaments, and premises situate at Woodborrow aforesaid, (meaning, amongst other

premises, the said close with the appurtenances,) and all other my real estate whatsoever and wheresoever, and all my money, goods, chattels, and personal property, unto my wife Sarah, her heirs, executors, administrators, and assigns, for ever, she paying thereout all my just debts, funeral and testamentary expenses. And I appoint my said wife sole executrix of this my will.”

The said Mordecai Glover the son, after making his said will, and whilst he was seised of the said close, with the appurtenances, as aforesaid, died on the 28th of May, 1843, without revoking or altering his said will, and without leaving any issue of his body lawfully begotten then living, and without having had any issue, and, except by making his said will, and the operation and effect (if any) thereof, without having disposed of and parted with his interest of, in, and to the said close, with the appurtenances.

The said Sarah Glover survived her said husband, the said Mordecai Glover the son, and, upon his death, entered upon the said close, with the appurtenances; and on the 2d of August, 1843, she was, by the Rev. E. G. Marsh, clerk, then being lord of the said manor, by R. B. Barrow, gent., his steward of the said manor, duly admitted tenant of the said

*453] close, with the appurtenances, and continued tenant of the said close, with the appurtenances, from the time when she was so admitted as aforesaid until the present time. [The case then set out the admittance of Sarah Glover at a special customary or copyhold court holden on the 7th of August, 7 Vict., 1843, on payment of a fine of 4s.]

The said Ann Stevenson died on the 21st of February, 1831, intestate, and leaving William Stevenson, the lessor of the plaintiff in this cause, her surviving; and which said William Stevenson was the youngest son, and customary heir of the said Ann Stevenson, according to the custom of the said manor.

On the 29th of August, 1843, the said William Stevenson was, by the said E. G. Marsh, clerk, then being lord of the said manor, by R. B. Barrow, gentleman, his steward of the said manor, admitted tenant of the said close, with the appurtenances. [The case set out the admittance of William Stevenson at a special customary or copyhold court holden on the 29th of August, 7 Vict., 1843, on payment of a fine of 1s. 11d.]

It has been agreed between the parties that the court shall be at liberty to make any presumption, and presume any fact or facts, matter or matters, in the same manner as a jury might have done upon a trial.

The question for the opinion of the court is—whether the said William Stevenson, the lessor of the plaintiff, on the 29th of August, 1843, was entitled to the said close, with the appurtenances. If the court are of opinion that he was then entitled to the same, the judgment is to be entered for John Doe, the nominal plaintiff, against the said Sarah Glover, the defendant, by default, or otherwise, as the court shall direct; and the said William Stevenson’s costs of and relating to this case are to be in

cluded in, and taxed as part of, the plaintiff's costs. But, if the court are of a contrary opinion, then the said Sarah Glover, the defendant, is *to be at liberty to sign, and enter up, a judgment of non-pros. [454 as for not replying, or otherwise, as the court shall direct, and the said Sarah Glover's costs of and relating to this case are to be included and taxed as part of her costs.

The case now came on for argument.

Sir T. Wilde, Serjt., for the plaintiff.(a) The limitation over to the testator's illegitimate daughter, Ann Stevenson, was a good limitation by way of executory devise, and, in the events that have happened, viz., the death of Mordecai Glover the son, without having executed any conveyance of the estate in his lifetime, such limitation took effect; and, consequently, the lessor of the plaintiff, the customary heir of Ann Stevenson, is now entitled to the possession. The first part of the devise to Mordecai Glover the son is undoubtedly sufficient to convey to him a fee: but the estate so given is qualified and restrained by the subsequent limitation, directing that the property shall go over to the daughter in the event of the son not disposing or parting with it in his lifetime. The power thus given him, he clearly did not exercise; for he died seised. That this is a good executory devise, is clear from numerous authorities. Thus, in *Porter v. Bradley*, 3 Tr. 143, it was expressly determined, that, if lands be devised to A., his heirs and assigns for ever, and if he die *leaving no issue behind him*, then over, the limitation over is good by way of executory devise. Though the opinion expressed by Lord KENYON in that case, negating the distinction taken by Lord MACCLESFIELD in *Forth v. Chapman*, 1 P. Wms. 663, as *to the [455 meaning of the words "dying without issue," as applied to real or to personal estate, has since been considered to be incorrect—per Lord ELDON, in *Crooke v. De Vandes*, 9 Ves. 197,(b)—still the authority of the case, for the purpose for which it is now cited, has never been disputed. The distinction above alluded to was recognised by Lord LANGE DALE, M. R., in the recent case of *Byng v. Lord Strafford*, 5 Beavan, 568, where his lordship observes: "I conceive, that, in the endeavour to discover the intention, it is necessary to look at all the dispositions he has made by his will, and to consider the effect of them, and that the circumstance of his giving the real and personal estates together, and intending them to go together, is not to be disregarded. But it has been established that the words of a will must be construed with reference to the subject-matter, and that the same words, even in the same sentence, may have one effect in their application to real estate, and another effect in their application to personal estate." Assuming, then, that the gift

(a) The point marked for argument on the part of the plaintiff in the paper-books, was, that, under the facts stated in the case, the limitation over in the will of Mordecai Glover, the father, to Ann Stevenson, took effect.

(b) And see the cases collected in Crutwell's Digest, vol. vi. pp. 404, et seq.

is an executory devise, cutting down the interest which the son was to take, upon the happening of certain events, which have happened. The only question, therefore, for our consideration is, what was the intention of the testator. Upon that point, also, the case appears to me to be free from doubt. After giving to his wife an estate for life in all his customary or copyhold and real estates, the testator proceeds:—"and, from and immediately after her decease, then I give and devise all and singular my aforesaid messuages, lands, &c., unto my son Mordecai Glover, and his heirs and assigns for ever, to hold to him and his heirs and assigns for ever; but, in case my said son Mordecai Glover shall happen to depart this life without leaving any issue of his body lawfully begotten then living, or being no such issue, and he my said son *shall not have disposed and parted with* his interest of, in, and to the aforesaid copyhold estate and premises, then, and in such case, I give and devise the same customary or copyhold messuages, &c., and real estate, unto and to the use of my illegitimate daughter Ann Stevenson, and of her heirs and assigns for ever." The words "parted with," which are in apposition to, seem to me to be explanatory of, the prior and more general word "dispose," and clearly to indicate a disposition or parting with the estate by the devisee, by a conveyance that was to have its complete effect and operation *in his lifetime*. If "parted with" had been the sole phrase used, it could only have been satisfied by a conveyance by a deed executed by the party in his lifetime: and, when we find the two expressions thus coupled together, I think we cannot give a more extended interpretation *460] to the word "disposed" than the sentence would have been susceptible of if that word had not been found in it. But, even if it had rested upon the word "disposed," I should have inclined to hold, upon the principle that a will is ambulatory, and speaks only from the time of the testator's death, that a devise of the estate in question was not a *disposing* of it within the meaning of this will. The fair inference arising from the whole scope of the will tends to the same conclusion. The testator, in the first place, gives the estate to his son and to his heirs, should he have any; and he gives him full power to dispose of it in his lifetime. But he goes on to evince, in the event of his son dying and having no issue, a natural desire that the estate should go to his illegitimate daughter, provided his son's wants should not have made it necessary for him to part with it in his lifetime. And this was by no means an unreasonable mode of dealing with the property. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

COLTMAN, J. I am unable to perceive any objection to the gift over in this case, as an executory devise. There is nothing in it that is repugnant to, or inconsistent with, the prior devise: nor does it operate any restraint on alienation; on the contrary, it expressly recognises the power of the son to alien the estate during his lifetime. Then comes the question whether or not the son has disposed and parted with the estate, as

cording to the intention of the testator. Construing those words grammatically, they clearly point to an act to be done, and to take effect, in the lifetime of the son. The words are—"in case my said son shall not have *disposed and parted with* his interest of, in, and to the aforesaid copyhold estate and premises, then and in such case, I give and devise the same customary or copyhold messuages, &c., and real estate, unto, and to the use of, my illegitimate daughter Ann Stevenson, and of her heirs and assigns *for ever." To what period do these words [*461 "disposed and parted with" apply? Clearly, to the time of the son's death:(a) and at that time he had not done any thing to divest the estate out of him. The construction, therefore, upon which the lessor of the plaintiff relies, is evidently the true one. And this construction leads to no incongruity or absurdity: it is a very rational and proper mode of disposing of the estate. If, as was suggested by my brother CRESSWELL, the son, having no children, should wish to dispose of the estate in his lifetime, the testator leaves him at full liberty to do so: but, in the event of his not having exercised that power, and dying childless, the intention of the testator was, that his own illegitimate daughter,—whom he was under a moral obligation to provide for,—should have the estate, and not that the son should have power to dispose of it by will, in the manner he has assumed to do.

CRESSWELL, J. I am entirely of the same opinion. It has hardly been denied that the disposition in favour of the testator's illegitimate daughter was a good executory devise, in the first instance. There was no condition that was repugnant to, or inconsistent with, the prior devise to the son. The son might have prevented the devise over from taking effect, by disposing of the property in his lifetime. But, in the event of his not exercising that power, the estate is given over, and nothing remains for him to part with by his will.

EARLE, J. I also am of opinion that the plaintiff is entitled to judgment. The intention of the testator evidently was, to give to his son absolute dominion over the estate, provided he chose to exercise that dominion in his lifetime, but not to leave to him the selection of [*462 "the object of his bounty by his will. Such appears to me to have been the intention of the testator; and I think the words he has used are incompatible with any other construction. The restriction imposed upon the power of alienation became effectual by the son dying seized.(b) For these reasons, I am of opinion that the case of the defendant, who claims under the son's will, fails.

Judgment for the plaintiff.(c)

(a) This appears from the *trust* used; the words "shall not have" being equivalent to "shall not already have."

(b) *Quere*, whether Mordecai Glover, the son, might not have defeated the executory devise, by a disposition by deed, *subject to a power of revocation*.

(c) The devise to Ann Bradley appears to be, grammatically at least, informal, in omitting the words "unto and to the use" at the asterisk, *supra*, 450. In consequence of this omission there is, perhaps, in strictness, no devise of the fee to her at all.

WADE v. WOOD. *April 16.*

A prisoner in custody under process of contempt of this court, is liable to be charged in execution upon a judgment in this court in the ordinary way.

CHANNELL, Serjt., moved to charge the defendant, a prisoner, in execution.

The defendant, in person, objected that he could not properly be charged in execution in this suit, inasmuch as he had never been arrested upon, or served with, any civil process, but was in custody only under a commitment by this court for a contempt of court in not answering to certain interrogatories that had been exhibited against him in a cause of *Roden v. Wood*, and also under a re-commitment by the court of Chancery for a contempt of that court. [CRESSWELL, J. The original commitment by this court is not superseded by the re-commitment by the court of Chancery.

*463] *Channell*, Serjt., submitted that, although in custody for a contempt, the defendant was liable to be brought up to be charged in execution, in the same manner as if he had been in custody under the ordinary process of the court. [*Byles*, Serjt., *amicus curie*, referred to the case of *Gibb v. King*, antè, p. 1.]

TINDAL, C. J. I am unable to see any reasonable ground of objection to charging the defendant in execution in this case. It is true that this court cannot, by its ordinary process, thus deal with a prisoner in criminal custody, inasmuch as that would be open to the objections pointed out in the case to which my brother *Byles* has referred us. But I look upon this defendant as being just as much a prisoner in the custody of the jailor of this court as if the Fleet prison were still existing as the peculiar prison of the court; for, the operation of the statute 6 & 7 Vict. c. 20, is, to make the Queen's Prison the prison of all the courts, in the same manner as the Queen's Bench Prison was formerly the prison of the courts of Queen's Bench and Exchequer, and the Fleet Prison, that of the court of Chancery and of this court.

The defendant in the present case being in custody for a contempt of this court, I see no difficulty in the plaintiff's charging the defendant, and our committing him, in execution in the way in which prisoners in custody under the process of the court are ordinarily charged and committed.

The rest of the court concurring,

The prisoner was committed in execution.

*WILLIAMSON v. PAGE. April 16.

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An order for a joint commission to examine witnesses in Ireland, besides the usual provision for the delivery of interrogatories and cross-interrogatories by each party to the other, empowered the commissioners to put, or cause to be put, additional questions *when it should appear to them* to be necessary and proper, such questions to be put down in writing and returned with the answers, together with the interrogatories and answers under the commission:—*Held*, that this power was not well exercised by the commissioners allowing the agent for one of the parties to put additional questions, subject to the objection raised by the other party.

ASSUMPSIT, for work and labour, money lent, money paid by the plaintiff for the use of the defendant, commission, and money found due upon an account stated. Plea, except as to 15*l.*, non assumpsit, and, as to that sum, payment of 15*l.* into court, and no damages *ultrà*. Repliation, damages *ultrà*.

The cause was tried before CRESSWELL, J., at the last summer assizes, at Liverpool. The plaintiff, it appeared, was a ship-broker at Belfast, in Ireland; the defendant, a ship-owner, residing at Scarborough, in Yorkshire. The action was brought to recover the amount of certain advances alleged to have been made by the plaintiff to the captain of the brig *Adventure*, of which the defendant was owner, for the use of that vessel whilst at Belfast, in November, 1843, under the following circumstances:—The *Adventure* arrived at Belfast from Gibraltar, on the 28th of October, with a cargo consigned to one Simms. In November, she sailed from Belfast with a cargo procured by the plaintiff, who made the following advances to the master for the ship's use, viz., 8*l.* 15*s.* 4*d.* for ballast-charges, 2*l.* 15*s.* the charge for stowing the vessel, 3*l.* for light-dues, 1*l.* 13*s.* for seaman's dues, and 20*l.* to enable the captain to pay for meat and groceries supplied to the vessel; making together the sum of 36*l.* 3*s.* 4*d.*

In order to show that these advances were not necessary, evidence was given on the part of the defendant, of the receipt, by the captain, of moneys amounting to 82*l.*, *out of which he had paid 35*l.* 19*s.* [465
to the mate and crew for wages, and 1*l.* 10*s.* for other purposes, leaving a balance of 44*l.* 11*s.* in his hands at the time that the advances were alleged to have been made by the plaintiff. A witness was also called to prove that it was not usual for brokers at Belfast, unless upon communication with the owner, to make advances to masters of vessels, except for the purpose of defraying port-charges and seamen's wages

On the part of the plaintiff, it was insisted that the master was the agent of the owner for the purpose of charging him for advances of the description made here: and the following passage was read from Abbott on Shipping, 6th edit. p. 116: "As the master in general appears to all the world as the agent of the owners in matters relating to the usual employment of the ship, so does he also in matters relating to the means of

employing the ship the business of fitting out, victualling, and manning the ship, being left wholly to his management in places where the owners do not reside and have no established agent; and frequently also even in the place of their own residence. His character and situation furnish presumptive evidence of authority from the owners to act for them in these cases, liable indeed to be rebutted by proof that they, or some other person for them, managed the concern in any particular instance, and that this fact was actually known to a particular creditor, or was of such general notoriety that he cannot be supposed to be, because he ought not to have been, ignorant of it, or that they were, by the terms of the contract, expressly excluded. In order, however, to constitute a demand against the owners, it is necessary that the supplies furnished by the master's order, should be *reasonably fit and proper for the occasion*, or that *466] money advanced to him for the purchase of them should at the time appear to be *wanting for that purpose*."

On the part of the defendant it was contended, that, regard being had to the fact of the master being already possessed of sufficient funds belonging to the owner, and to the proximity of the place where the vessel was to the place of the owner's residence, and the facility of communicating with him, the advances in question were unnecessary and unauthorized.

The evidence on both sides principally consisted of the examinations of witnesses at Belfast under a joint commission issued under a judge's order, by consent, directed to four commissioners, two named by each party. The order contained the following special provisions:—"That the said commissioners may put, or cause to be put *additional questions*, when it shall appear to them the said commissioners to be necessary and proper, such questions to be put down in writing, and returned with the answers, together with the interrogatories and answers under the said commission; that each party be at liberty to cross-examine upon interrogatories, and that each party shall deliver to the other their interrogatories in chief, within fourteen days from the date hereof, and that such cross-interrogatories be handed to the attorney or agent of the other party within ten days of the receipt of the interrogatories in chief; and that the answers of the witness or witnesses upon such interrogatories and cross-interrogatories and questions, together with the questions, shall be put down in writing, and returned with the said interrogatories, cross-interrogatories, questions, and answers, as hereinbefore directed."

When the parties appeared before the commissioners, the defendant, who had exhibited six interrogatories to one of the witnesses named McDowall, abandoned three of them, and desired the commissioners to *467] administer the remaining three only, which they accordingly did, subject to an objection on the part of the plaintiff. The defendant also declined to have several of his cross-interrogatories put. And at his agent's request, (subject to objection on the plaintiff's part,) addi-

tional questions, suggested by him, were put by the commissioners; which additional questions, together with the answers thereto, were put down in writing, and returned with the commission, accompanied by the following statement by the commissioners:—"The attorney attending before us on the part of the defendant relinquished the other direct interrogatories of the defendant attached to the commission as regards the witness under examination, and proposed to proceed with his examination on additional questions to be administered under the commission. The plaintiff objects to the defendant's right to adopt this course, and insists that the defendant is bound to examine the witness to all the defendant's direct interrogatories attached to the commission, and also that the defendant is not, under the circumstances, entitled now to proceed to examine the witness on additional questions in the manner proposed. Subject to these objections we have proceeded with the examination of the said witness on such additional questions."

At the trial the defendant proposed to read the answers to these additional questions; whereupon it was objected, on the part of the plaintiff, that the order, by virtue of which the commission issued, though it authorized the commissioners themselves to put additional questions for the purpose of elucidating the answers given to the interrogatories and cross-interrogatories, did not authorize the defendant to put additional questions which the plaintiff had had no previous opportunity of seeing.

The learned judge, yielding to the objection, declined to allow the answers to the additional questions to be read: and he left it to the jury, generally, to say, whether *or not the circumstances were such [468 as reasonably to induce them to conclude that the advances were necessary for the ship's use, and that the captain had authority to incur the responsibility on behalf of his owner.

The jury returned a verdict for the plaintiff, damages 25*l*.

Channell, Serjt, in Michaelmas term last, moved for a new trial, on the grounds of misdirection and the improper rejection of evidence. The learned judge ought to have left it to the jury to say whether or not the master had funds of his owner's in his hands at the time of the alleged advances, and whether or not communication might have been conveniently had with the owner before the advances were made; for, though it is true that the master, whether in a home, or in a foreign, port, has implied authority to borrow money for the necessary use of the ship, if the owner be absent, and no communication with him can be had without great prejudice and delay, yet the doctrine to that effect laid down in *Abbott on Shipping*, and on which reliance was placed at the trial, is subject to the qualification engrafted on it by two recent cases, viz. *Stonehouse v. Gent*, 2 Q. B. 431, and *Johns v. Simons*, 2 Q. B. 425. In the former of those cases, it was held that the master had no implied authority to pledge the owner's credit in respect of necessary supplies and advances for the use of the vessel during several weeks while she lay

at Newport, Monmouthshire, the owner, during all the time, being resident at Plymouth, and nothing appearing to have prevented a communication, if desired, between the master and owner. And in the latter, where the ship was in the port of Swansea, and the owner at Llanely, only eleven miles distant, and the master, being in want of money to clear the vessel, and having been unable to raise it (as the owner had directed) by selling part of the cargo, sent three messages to the *469] owner for money, but received no money; whereupon he borrowed 10*l.* of the plaintiff, telling him of the applications made to the owner; it was held that the master was not authorized to borrow, and that the lender could not recover the money from the owner, though the jury found that the advance was for the necessary use of the ship, and on the credit of the owner, not of the master. [MAULE, J. The circumstances upon which you rely were not withdrawn from the consideration of the jury; they seem to me to be necessarily involved in the questions that were submitted to them.] It was left to the jury, whether the advances were necessary: they might have become so by reason of the captain's misconduct. Though the questions which the defendant desired to have submitted were not actually withdrawn from the jury, they were not adverted to with sufficient distinctness. [CRESSWELL, J. I think, in addition to reading to the jury the passage cited from Abbott on Shipping, I adverted to the case of *Stonehouse v. Gent*, and *Johns v. Simons*; and that I left it to them, generally, to say whether or not the circumstances were such as to show that the captain had implied authority from the owner to act as he did.]

With respect to the rejection of evidence, the order for the commission, empowering the commissioners to put such additional questions as should appear to them to be necessary, ought to receive a liberal construction; and that power was well exercised by their putting questions suggested by the defendant's agent.

TINDAL, C. J. My brother CRESSWELL reports to us that he left it to the jury to say whether or not, taking into their consideration all the surrounding circumstances—and among others, of course, the proximity of the owner's residence to the place where the vessel was, and the probability of the captain having funds of his owner, *470] applicable to the purposes of the ship—they thought the captain had an implied authority to bind his owner for the advances in question. If so, the case appears to us to have been correctly left, and consequently there is no ground for a rule upon the point of misdirection.

Upon the other point, however, viz., the rejection of evidence, a rule may go.

Murphy, Serjt., (with whom was *F. Robinson*,) now showed cause. The view taken by the learned judge was clearly correct. The intention of the order evidently was, that the commissioners should have power to put additional questions elucidatory of the matters naturally arising out

of the interrogatories and cross-interrogatories to be submitted by them to the witnesses, not, as here, to adopt questions suggested by one of the parties, starting a case entirely different from that to which the attention of the opposite party had been invited by the interrogatories and cross-interrogatories delivered pursuant to the order. Such a course would be totally inconsistent with the compact of the parties.

Channell, Serjt., (with whom was *Webster*,) in support of the rule. The view taken by the learned judge at the trial was much too narrow. The fourth section of the 1 W. 4, c. 22, authorizes the court, or a judge, upon the application of any of the parties to the suit, "to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same, or any subsequent, order or orders, to give all such directions *touching [471 the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examination, as may appear reasonable and just." In construing the power given to the judges by this statute, it is important to bear in mind that there are many cases in which a judge might hesitate to grant an order for a commission where the application was opposed; and yet, if terms were suggested that might in a degree obviate or remove the inconvenience to the opposing party, the issuing of the commission might be matter of consent. And here, it is to be observed, the order is for a *joint* commission; and it was made with consent of both parties. The power to put additional questions is one of very great importance, and may sometimes be attended with advantage to the administration of justice. And the practice is not new. In the case of *Pole v. Rogers*, 3 New Cases, 780, 4 Scott, 479, which was an action on a life policy, the defendant having obtained a judge's order for the examination upon interrogatories of witnesses residing at Paris and Boulogne, this court, at the instance of the plaintiff, amended the order by adding to its terms, that the plaintiff might be at liberty to cross-examine the witnesses *riud voce*, and the defendant, to put additional questions; the cross-examinations and answers to be reduced into writing, and returned with the commission. [ERLE, J. The course adopted in that case may be extremely convenient when proper persons can be found on the spot to conduct the examination; but in the present case the commission is not in that form.] The answers to the examination in chief often suggest the questions to be put in cross-examination: and here, if the additional questions be looked at, it will be found that the particular course of inquiry [472 was rendered *necessary by the answers given to the interroga-

tories in chief. [TINDAL, C. J. The question is, not whether the additional inquiry was important, but whether it struck out a new line of defence.] No new line of defence is suggested: all the additional questions *473] fairly arise out of the answers to the interrogatories.(a) The *words of the order are comprehensible enough to give the right

(a) The interrogatories that were particularly referred to were the following:—

Fourth. What are the ballast-office charges at Belfast? Did the captain of the *Adventure* represent to you, or in your presence, that ballast-office charges, to any and what amount, were due in respect of the said vessel? When did he make such representation, and what did he say when he made it? Did he say any thing, and what, about having or not having money to pay the same with, and any thing, and what, about the said vessel being or not being able to leave the harbour of Belfast until the said ballast-office charges were paid? Did he apply, in your presence, to any one, and to whom, for money wherewith to pay the said charges, and for what amount? And, what did he say on that subject?

Sixth. Did you pay the said ballast-office charges for the said ship *Adventure*? If yes, what sum did you so pay? Did you pay the same with your own money, or with the money, and on the account, of any one else; and of whom? When did you make such payment, and to whom was it made? Have you any reason to suppose that the amount which you so paid was not then due in respect of the said ship *Adventure* for ballast-office charges? Do you believe that the same was then due? Was the amount the fair and proper amount to be charged in respect of the said ship?

Seventh. Look at the writing now produced and shown to you, and marked A., and purporting to be a receipt of W. E. Young; is the name of W. E. Young on that receipt written, the proper handwriting of the said W. E. Young, and did you see him write his name therein, and when? And on what occasion and for what money was the said receipt given?

Ninth. Do you know the stevedore of Belfast harbour, and what is his name? Did you see the said stevedore stowing a cargo in the said ship *Adventure*? If yes, when was it that you so saw him? Did you see any one pay the said stevedore any sum of money for so stowing the said cargo? If yes, when and where was the payment made, what was the sum, and who paid it, and with whose money was it paid? And, what was said and done on the occasion of the money being so paid, and who was present on that occasion?

Tenth. Did the said captain of the said ship while she was so at Belfast, apply to you, or to any one, and to whom, in your presence, for money wherewith to pay the said stevedore for so stowing the said cargo, or say any thing, and what, about having or not having money wherewith to pay the said stevedore for so stowing the said cargo, or generally about having or not having money wherewith to disburse the said ship? And, what did he say on the occasion or occasions to which you may refer in answering this interrogatory?

Eleventh. Do you consider that the sum of 2*l.* 15*s.* is a moderate charge for stowing a vessel of the size of the *Adventure*, as it was stowed by the said stevedore?

Twelfth. Do you know of your own knowledge whether the said captain could have had the said vessel stowed with the said cargo without employing some fit person besides himself, the said captain, and the crew? Was the said stevedore a fit person for the said captain to employ to stow the said cargo? Was it reasonable and proper in the said captain to employ the said stevedore to stow the said cargo, and why?

The answers to these interrogatories were as follow:—

To the fourth. The ballast-office charges at Belfast are tonnage duty at 4*d.* per ton on the vessel in and out of port. The charge on the inward cargo is 6*d.* per ton. I am not certain what the charges are on the outward cargo. There is also pilotage out and in: but I am not certain of the rate. The captain of the vessel sent me by Mr. Williamson's orders to the ballast-office to ascertain what were the ballast-office charges due in respect of the said vessel: and, when I went to the ballast-office, Mr. Young, a clerk in the ballast-office, desired me to bring 10*l.*, and he would make out the account. The captain, previous to sending me to the ballast-office, represented that ballast-office charges were due. It was on the 17th of November that the captain made such representation; and, when he made it, he said that the ballast-office charges were due, and that he could not sail until they were paid. He said he had got no money to pay the same with. He applied to Mr. Williamson for money wherewith to pay the ballast-office charges. The amount he applied for was 45*l.* He said that he wanted money to buy provisions for the vessel, and other things he stood in need of, before proceeding to sea.

To the sixth. I paid the ballast-office charges for the said ship *Adventure*. I paid 8*l.* 15*s.* 4*d.* for the said ballast-office charges. The money that I paid the charges with was Mr. Williamson's, and I paid the money on account of the brig *Adventure*. [The question being

to put such additional questions: and, if there be a doubt, it is more convenient that the questions should be put than that the evidence should be excluded. The power, too, is one that may be [474

repeated, the witness said] I paid the money on account of Mr. Williamson, the plaintiff. I made such payment on the 17th of November last. I made the payment to Mr. Yeung, a clerk in the ballast-office. I have no reason but to believe that the amount which I so paid was due; and I do believe that the same was then due. The amount paid was the fair amount to be paid in respect of the said ship.

To the seventh. I have looked upon the paper writing now shown to me, marked A., and purporting to be a receipt of W. E. Young: the name W. E. Young on that receipt written, is the proper handwriting of the said W. E. Young. I saw him write his name thereto. I saw him sign same some time since November. The paper produced is a duplicate receipt. The first receipt, of which that produced is a duplicate, was given on the occasion of paying the ballast-office dues on the ship, amounting to 8*l.* 15*s.* 4*d.* The first receipt was given to Captain Allen, the master of the Adventure; and the duplicate was obtained after Mr. Page refused to pay the money. I cannot state the day or month on which the said W. E. Young signed the duplicate receipt.

To the ninth. I do not know that there is any proper person who is stowere of Belfast harbour; but I know W. Osborne, who stowed the brig Adventure. I saw Osborne stowing a cargo in the said ship Adventure. I saw him do so in November last: I think it might be about the 14th or 15th of the month. I paid Osborne 2*l.* 15*s.* for so stowing the said cargo. The payment was made in the plaintiff's office on the 17th of November last. I paid the above sum with Mr. Williamson's money. On that occasion, the captain requested the plaintiff to pay the money, for he had got no money to pay it with: there were present, the captain, the plaintiff, and Osborne; and I think there might be present some of the persons who assisted Osborne in stowing the ship.

To the tenth. The captain of the said ship, while she was at Belfast, applied to the plaintiff, in my presence, for money to pay the said W. Osborne for so stowing the said cargo. The captain said he had not got money himself to pay for the stowing. The captain also stated that he had not any money to disburse the said ship, and that he would have to draw on his owners for money. The captain asked what would be the expense of commission for the plaintiff drawing on the owners for the amount that would pay his dues and disbursements here, which was 46*l.*; to which the plaintiff answered that the commission would be 2*l.* 6*s.*, and no less.

To the eleventh. I think that the sum of 2*l.* 15*s.* was a moderate charge, and very reasonable, for stowing a vessel of the size of the Adventure, as it was stowed by Osborne.

To the twelfth. I do know that the captain could not have the said vessel stowed with the said cargo without employing some fit person besides himself and the crew, there being none on board except the captain himself and two apprentices, and a person whom the captain stated to me to be a friend of the owner's. All the crew were paid off when the vessel arrived at Belfast. The cargo, which consisted of pit-prop wood, was laid on the quay about two or three perches from the vessel: and Osborne, who stowed the vessel, was a fit person for the captain to employ to stow the said cargo. It was reasonable and proper for the captain to employ Osborne to stow the said cargo, because I do not think the apprentices could have stowed the same. I do not think the apprentices worked while the ship was at Belfast; and I believe one of them ran away. The apprentices would not work at this description of work, such as running goods from the quay on board the ship.

The additional questions to which particular reference was made, were as follow:—

First. On what day did the captain send you, by the plaintiff's orders, to the ballast-office, to ascertain the amount of charges due on the vessel there?

Second. What time of the day were you sent?

Third. Look again at the duplicate receipt marked A. What statements or representations did you make to W. E. Young, to induce him to give you the said duplicate receipt? And what passed between you and the said W. E. Young on the occasion?

Fourth. Did Mr. Young hesitate or object to give you the said duplicate receipt?

Fifth. Is Osborne a person regularly or frequently employed by the plaintiff to stow vessels?

Eighth. Is there not a regular charge by the ton, for stowing pit-prop wood?

Ninth. Have you not heard that 3*d.* per ton is the regular charge?

Tenth. You have stated that men were employed to carry the wood to the vessel. If there was any extra charge or expense occasioned thereby, should not the merchant supplying the wood have paid or made good the same, instead of being charged to the owners of the ship?

exercised for the benefit of the party moving for the commission,

*475] *as well as against him. [CRESSWELL, J. The *commissioners* are,

by the order, empowered to put additional questions, if they think fit: can you say that these questions were put by *them*?] They are not the less put by the commissioners, because suggested by the defendant's agent. The commissioners did not object to their being put. [ERLE, J. They did not take upon themselves to decide that they were fit to be put: they reserved that for our determination.]

*476] *TINDAL, C. J. In this case the commissioners had, in the first

instance, power to examine the witnesses upon interrogatories and cross-interrogatories, to be administered on behalf of the plaintiff and the defendant respectively: and, if the matter had stopped there, they could not have departed from the course marked out for them. But, by the order, further power was given to them, namely, to "put, or cause to be put, additional questions, when it should appear to them the said commissioners to be necessary and proper;" the object being, not to introduce a general new course of examination, but supposing that they would exercise a proper discretion in administering on the spot such questions only as might be necessary to elucidate difficulties arising *pro re nata*. It was clearly the object of the order to intrust this to the discretion of the commissioners. That being the bargain between the parties, the question for us to consider is, whether or not the commissioners have exercised any discretion at all. It appears to me that they did not exercise their own judgment: but they allowed the questions to be put, reserving it for the court to say whether they were proper or not. This they had no authority to do. It is the fault of the parties if the commission has been rendered fruitless. See the mode in which the commissioners have returned the exercise of this new discretion. They say: "The attorney attending before us on the part of the defendant relinquished the other direct interrogatories of the defendant attached to the commission as regards the witness under examination, and proposed to proceed with his examination on additional questions to be administered under the commission." If they had thought the additional questions reasonable and fit to be put, they would doubtless themselves have put them. It might not be necessary that the questions should have been put by the commissioners personally: if they had adopted them, that

*477] might *be a virtual compliance with the order. But they go on to say: "The plaintiff objects to the defendant's right to adopt this course, and insists that the defendant is bound to examine the witness to all the defendant's direct interrogatories attached to the commission, and also that the defendant is not, under the circumstances, entitled now to proceed to examine this witness on additional questions in the manner proposed." What is the determination of the commissioners? They merely say: "*subject to these objections*, we have proceeded with the examination of the said witness on such additional questions." It is impos-

sible not to perceive that the two commissioners named by the defendant thought the questions fit to be put, and the two named by the plaintiff thought otherwise; but they agreed that the decision of the matter should be reserved for the court. This, I think, they had no right to do, and, consequently, that the answers were properly rejected, and that the verdict must stand.

COLTMAN, J. My brother *Channell's* argument has satisfied me that many of the additional questions were such as might very properly have been put. But I am unable to see any exercise of discretion on the part of the commissioners—any adjudication by them whether or not they were fit to be put. I think they exceeded their jurisdiction in reserving that question for us.

ERLE, J. I am of opinion that the evidence was properly rejected, and that the verdict must stand. The question is, whether or not the additional evidence was within the authority conferred by the commission. The authority was, for the examination of witnesses upon interrogatories on both sides, each party to be at liberty to cross-examine, upon interrogatories, the witnesses produced by the other, and each party to deliver to the other their interrogatories in chief within four-
[*478
teen days, and such cross-interrogatories to be handed to the attorney or agent of the other party within ten days of the receipt of the interrogatories in chief. Neither the plaintiff nor the defendant had any right to put any questions except upon the conditions mentioned. The commissioners, however, had power to put or cause to be put additional questions when it should appear to them to be necessary and proper. It appears that the defendant abandoned some of his interrogatories in chief, and nearly all his cross-interrogatories; and that he claimed a right to put additional cross-interrogatories. The commissioners, no doubt, had a right to adopt the additional questions proposed by the defendant's agent, and themselves to put them to the witnesses. But they clearly did not so determine: the additional questions are shown to have been put by the defendant's agent in the shape of further cross-interrogatories. I agree that the questions so put were extremely reasonable, and that the commissioners would have acted properly had they put them, or had caused them to be put, to the witnesses. But that cannot avail to make the answers admissible.

CRESSWELL, J., expressed no opinion.

Rule discharged.

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*BENTLEY v. FLEMING. April 29.

In case for an infringement of a patent, the judge left three questions to the jury; and, on their retiring to consider their verdict, he handed to the associate an abstract of the pleadings, desiring him to take their finding separately on the three questions so submitted to them. The jury returned into court, stating that they found a verdict for the plaintiff generally. The counsel for the defendant requested the associate to put the questions separately: this he declined to do, notwithstanding one of the jurymen intimated that three points had been distinctly put to them by the judge; the plaintiff's counsel objecting to that course:—The court directed a new trial, without costs.

Affidavits of jurymen as to what passes among themselves with reference to a verdict, are not admissible.

THIS was an action upon the case for an alleged infringement, by the defendant, of certain letters-patent, bearing date the 21st of December, 1841, granted to one W. C. Thornton, for "certain improvements in machinery or apparatus for making cards for carding cotton and other fibrous substances," the interest in which letters-patent had come to the plaintiff by assignment.

The cause was tried before CRESSWELL, J., at the last summer assizes at Liverpool. The only material issues upon the record were—first, whether the defendant had been guilty of an infringement—secondly, whether Thornton was the true and first inventor of the alleged improvements—thirdly, whether the invention, at the time of the granting of the letters-patent, was new as to the public use thereof in England.

The learned judge, having summed up the evidence as to the first issue, directed the jury as to the second and third issues, to the following effect:

The second plea is, that Thornton was not the true and first inventor. That implies that the invention was the invention of somebody else. Now, if you should be of opinion, upon the evidence, that Thornton derived his knowledge from another, and that the machine for which he obtained the patent, was not the fruit of his own genius and skill, but that the
 *480] invention had *either been verbally communicated to him, or copied by him from some other machine, the issue upon this plea must be found for the defendant. The next question is, as to the novelty of the invention. Now, whether the patentee had himself made known the invention, or whether it had been made known by others, before the date of the patent, is quite immaterial: for, although the invention might be the fruit of his own genius, unassisted by the mind or skill of another, yet, if the patentee had exhibited it publicly, or had made it the subject-matter of a sale, before he obtained his patent, he would have forfeited his right to the exclusive use of his invention. The question will be, whether the first part of the combination of machinery for the purpose of giving motion to the carriage or head-work of the machine used in the setting of wire in sheet-cards, called the sheet-card setting-machine, was

new, as to the public use and exercise of it in England, at the time the letters-patent were granted. A point has been raised as to the meaning of this part of the specification. I am disposed to construe it as the claim of a principle for moving the head-work instead of the card. If that be so, then you have evidence that Thornton had sold a machine to one Broadbent twelve months before the date of his patent. His own account of that machine is this:—"I sold that machine to Broadbent, with a travelling head-work, twelve months before the patent was taken out: he kept it standing in his own room."

The learned judge then left to the jury the following questions—first, whether or not the defendant had been guilty of an infringement—secondly, whether or not Thornton was the true and first inventor—thirdly, whether or not, before the date of the grant, a machine involving one of the parts of the alleged invention, viz., the travelling head-work, was sold by Thornton, or lent by him, and publicly used; and whether the travelling head-work of the machine that was sold to Broadbent [*481 was substantially the same as that of the patented machine.

The jury retired to consider their verdict, and the learned judge left the court, having previously handed to the associate an abstract of the pleadings, and desired him to take the finding of the jury upon each of the three issues above-mentioned.

Upon the return of the jury into court, they were asked by the associate whether they were agreed upon their verdict; whereupon the foreman replied in the affirmative. The associate then said, "Do you find for the plaintiff or for the defendant?" The foreman answered, "We find for the plaintiff." A discussion ensued between the junior counsel on either side and the associate, as to the amount of damages. The counsel for the defendant requested the associate to put the questions to the jury separately. To this the plaintiff's counsel objected; and the associate declined to put them. One of the jury then remarked: "We find unconditionally for the plaintiff." Another jurymen, addressing the associate, said: "I think there were three questions left for our consideration by the judge;" whereupon the associate interrupted him by saying, "I think you had better not, gentlemen. What damages do you find for the plaintiff?" The foreman replied: "Forty shillings."

Sir T. Wilde, Serjt., in Michaelmas term last, moved for a new trial, on the ground that the verdict was against evidence, and also on the ground of a miscarriage on the part of the jury. In support of the latter branch of the motion, he produced an affidavit of the defendant's attorney, detailing the above circumstances, and stating certain communications he had had with some of the jury, as to what had passed among [*482 themselves upon the subject of the verdict. He also produced an affidavit of the foreman, who deposed, that the answers to the three questions left to the jury by the judge were agreed upon and put down in writing, and that they came into court prepared to return the verdict

on those three points, but were prevented by the confusion that prevailed, and the refusal of the officer to put the three questions to them separately.

The following is a copy of the paper, which was annexed to the foreman's affidavit:—

“First, guilty of the infringement:

“Secondly, that the invention was entirely by Thornton:

“Thirdly, that the principle of traversing and changing motion of the head-work, was made known previously to the date of the patent, by the sale to Broadbent.

TINDAL, C. J. There is considerable difficulty with respect to the proper mode of obtaining information as to what passes privately among the jury. The courts have always expressed unwillingness to receive the affidavits of jurymen.(a) You may, however, take a rule generally.

Charnell and Byles, Serjts., (with whom was *Webster*,) now showed cause. They submitted that the verdict was properly taken; the jury having evidently intended it as an unconditional and unqualified verdict for the plaintiff upon all the issues; and that the subsequent discussion was altogether irrelevant and idle.

Sir *T. Wilde*, Serjt., (with whom were *Addison* and *Cowling*,) *contra*, was stopped by the court.

*483] TINDAL, C. J. It appears to me that there has been a miscarriage by the officer of the court, in taking the verdict in this case. If he had followed the directions given by the learned judge, the finding would have been such as to preclude all doubt or difficulty. As the matter now stands, it seems to be extremely doubtful, to say the least of it, whether that which was taken was really the verdict of the jury. It is enough to say that there may have been a difference of opinion among them. The remark made by one of the jury as to there having been three questions left for their consideration, was quite sufficient to call the attention of the associate to the issues that were to be submitted to them. His omission to take their finding on those issues, in obedience to the directions he had received, was a miscarriage on his part in taking the verdict, which can only be cured by granting a new trial. The rule will therefore be made absolute, without costs.

The rest of the court concurred.

Rule absolute accordingly.

(a) See *Burgess v. Langley*, 5 Mann. & Gr. 722, 6 Scott, N. R. 518.

ABBOTT v. DOUGLASS. *April 30.*

In the memorial of an annuity, part of the consideration money was stated to have been paid by "a draft of even date with the indenture, drawn by the grantee on Messrs. A. B. & Co.," not saying when the draft was payable:—*Held*, that the memorial was insufficient, and the grant consequently void.

The court, in such cases, only deal with the judgment signed upon the warrant of attorney, and will not interfere with the other securities.

By letters-patent bearing date the 18th of October, 1821, the defendant was appointed to the office of registrar of the archdeaconry of Norwich, for life. On the 12th of April, 1828, he granted to the plaintiff *an [484 annuity of 50*l.* per annum for the life of the defendant, in consideration of 450*l.*; to secure which annuity, he "granted, bargained, sold, and assigned unto the plaintiff, his executors, administrators and assigns, all the fees, yearly income, proceeds, profits, emoluments, and advantages of him, the defendant, of, arising, and to grow due and payable of and from the offices of registrar and actuary of the said archdeaconry of Norwich; and also the office of collector of all and singular the procurations and other profits within the said archdeaconry, that should, from time to time, grow due to him, the defendant, as registrar, actuary, and collector of the said offices and every of them, by right, custom, or any manner, formerly, then, or thereafter thereto belonging, and all manner of offerings, tenths, obventions, oblations, compensations, compositions, pensions, annuities, rents-charge, yearly income, fees, dues, issues, profits, emoluments, advantages, rights, members, and appurtenances, taken and thereafter to be taken and accepted by the defendant from any person or persons whatsoever, in lieu, substitution, satisfaction, or exchange for the fees, proceeds, profits, and emoluments, arising and to grow due and payable, of and from the said offices of registrar and actuary of the said archdeaconry of Norwich, or either of them; to have and to hold the said offices and every of them, with all and singular the fees, profits, and advantages to the said offices, or any of them, as is aforesaid, belonging, and out of them or any of them accruing and growing due, together with the custody and direction of all and singular the books, acts, exhibits, and muniments to the said offices belonging, and all and singular other the premises thereby assigned, or intended so to be, to the aforesaid plaintiff, for and during the natural life of him the defendant, to be well and faithfully executed by him the plaintiff or his sufficient deputy or deputies, without *the let or interruption of [485 the defendant, or any person or persons on his behalf;" and also the sum of 50*l.* a year payable to the defendant from the fees of the said office, by Henry Francis, his deputy, by virtue of an indenture of the 18th of October, 1821.

The defendant also, by way of further security, gave the plaintiff a war-

rant of attorney, for 900*l.*, upon which judgment was entered up on the 11th of July, 1829.

The deed further contained a covenant, on the part of the grantor, not to go to any place, or do any acts, whereby the plaintiff, his executors, &c., might be compelled to pay any extra premium for insuring his life, or to pay such extra premium within one month. And the defendant thereby constituted and appointed the plaintiff “deputy-receiver, agent, and attorney of him the defendant, in his, the defendant’s, name or in the name of the plaintiff, and in the place and stead of the defendant, to hold the said offices, and to ask, demand, collect and receive the fees, advantages, proceeds and profits thereof, and to do, perform, and execute all matters and things needful and requisite for collecting and receiving the said profits, as fully and effectually, to all intents and purposes whatsoever, as the defendant could or might himself do;” and he thereby empowered the plaintiff, “with, and out of, such proceeds or profits, to reimburse and satisfy himself his costs, charges, and expenses in the execution of the trusts of the deed, or in relation thereto, *together with the salary or allowance of one shilling in the pound, to be received by him for his trouble in collecting and receiving such rents, issues, profits, and sums of money as aforesaid.*”

A memorial of the annuity was enrolled on the 9th of August, 1828, which, in the column headed “Consideration, and how paid,” contained the following statement:—“The sum of 450*l.*—paid by the said William *486] Abbott to the said James Edward Morton Douglass in his own proper person, in manner following, (that is to say,) 23*l.* by a draft of even date with the aforesaid recited indenture of assignment drawn by the said William Abbott, on Messrs. Barnetts, Hoare, & Co.—17*l.* in sovereigns,—and the residue of the aforesaid sum of 450*l.*, being 410*l.*, in notes of the governor and company of the Bank of England payable to bearer on demand; and which three several sums make the aforesaid consideration of 450*l.*”

Byles, Serjt., in Michaelmas term last, obtained a rule calling upon the executors of William Abbott to show cause why the warrant of attorney in this cause, and the judgment signed thereon, and the annuity-deed and memorial, should not respectively be set aside, on the grounds—first, that the consideration was not properly stated in the memorial of the deed, as to the time of payment of the draft therein mentioned—secondly, that the consideration for the annuity was an illegal assignment of an office—thirdly, that a part of the consideration money was retained—fourthly, that the deed contained a covenant to pay an additional premium of insurance, in a certain event—fifthly, that it contained a covenant to allow the grantee to take one shilling in the pound of the amount collected by him from the fees of the said office. The motion was founded upon the affidavit of the defendant, to which were annexed copies of the annuity-deed, warrant of attorney, and memorial; and which alleged that the same

gentleman acted as solicitor for both parties in the transaction, and that he retained 65*l.* of the consideration money for his charges for negotiating and preparing the securities; and that the consideration money was paid as follows—410*l.* in notes of the governor and company of the Bank of England, payable to the bearer on demand, 17*l.* in current gold coin of the realm, and 23*l.* by a *certain draft of even date with the annuity-deed, drawn by William Abbott on Messrs. Barnetts, Hoare, & Co., bankers, London; but whether the said draft was payable at sight, or on demand, or at any certain time therein stated, the deponent did not recollect, and was unable to state. In support of the first ground of objection, the learned serjeant cited *Drake v. Rogers*, 2 Brod. & Bingh. 19, 4 J. B. Moore, 402; in support of the second he relied on the statute of 5 & 6 Edw. 6, c. 16, s. 2, and the case of *Layng v. Paine*, Willes, 571, where it was held that the office of registrar of an archdeaconry is an office, within that statute; and upon the fourth he referred to *Wood v. Perrott*, 5 J. B. Moore, 63. [*487]

Manning, Serjt., in Hilary term last, showed cause. (a) He produced an affidavit to which was appended the identical "draft" referred to in the memorial, and which appeared to be a check for 23*l.* on Messrs. Barnetts, Hoare, & Co., the bankers, payable to bearer, and to have been duly paid. The 17 Geo. 3, c. 26, s. 1, recited that "whereas the pernicious practice of raising money by the sale of life-annuities hath of late years greatly increased, and is much promoted by the secrecy with which such transactions are conducted;" and enacted "that a memorial of every deed, bond, instrument, or other assurance whereby any annuity or rent-charge shall from and after the passing of this act be *granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall, within twenty days of the execution of such deed, bond, instrument, or other assurance be enrolled in the high Court of Chancery; and that every such memorial shall contain the day of the month and the year when the deed, bond, instrument, or other assurance bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same; otherwise every such deed, bond, instrument, or other assurance shall be null and void, to all intents and purposes." Under that statute, considerable strictness was required to be observed in the statement of the consideration. If part of it was paid [*488]

(a) The argument was confined to the first and second objections. The first objection only being noticed in the judgment, the arguments on the second are omitted.

The authorities cited in answer to the first objection were:—*Dr. Trevor's case*, Cro. Jac. 269; *Woodward v. Foze*, 2 Vent. 187, 213, 267, 3 Lev. 289, and *Hicks v. Raincock*, 1 Cox, 40; in support of it, *Layng v. Paine*, Willes, 571; *Dr. Trevor's case*, Cro. Jac. 269, 12 Co. Rep. 78; *Palmer v. Bate*, 2 Brod. and Bingh. 673, 6 J. B. Moore, 28, and Com. Dig. tit. *Courts*, (N. 9.)

in promissory notes,^(a) or country bank-notes,^(b) it was necessary to show whether they were payable on demand or otherwise. But, even under that statute, bank-notes and checks might have been described as money: *Wright v. Reed*, 3 T. R. 554; *Cousins v. Thompson*, 6 T. R. 335; *Ex parte Michell*, 2 East, 137. The 53 G. 3, c. 141, was intended to relieve grantees from the technical difficulties introduced by the former statute: per BAYLEY, J., in *Crowther v. Wentworth*, 6 B. & C. 366, 9 D. & R. 286. The first section repeals the former provision: and sect. 2 enacts, "that within thirty days after the execution of every deed, &c., whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of *489] years, or greater estate, determinable on one or more life or

lives, a memorial of the date of every such deed, &c., of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the high Court of Chancery, in the form, or to the effect, following, with such alterations therein as the circumstances of any particular case may reasonably require; otherwise every such deed, &c., shall be null and void to all intents and purposes." In the form of memorial in that section, in the column headed "Consideration, and how paid," are these words and figures:—"100*l.* paid in money; 500*l.* paid in notes of the governor and company of the Bank of England, or other notes, or bills of exchange, as the case may be;" not saying whether payable on demand or otherwise. In *Faircloth v. Gurney*, 9 Bingh. 622, 2 M. & Scott, 822, 1 Dowl. P. C. 724, the annuity deed stated the consideration to have been paid in bank notes and sovereigns; the memorial stated it (according to the fact) to have been paid in bank-notes only: and it was held that this was no ground for setting aside the annuity. So, in *Cane v. Lovelace*, 2 B. & Adol. 767, A. having agreed with B. to advance him a sum of money, and to pay off an annuity formerly granted by him, B. executed a deed whereby, in consideration of 1050*l.*, he covenanted to pay an annuity to A., and assigned to him certain dividends, upon trust, for the purpose of securing the annuity: the 1050*l.* were paid to B., the grantor, who directly returned to the grantee the sum necessary for paying off the annuity,

*490] and he immediately paid it over for that purpose. In the memorial enrolled pursuant to the statute 53 Geo. 3, c. 141, the consideration for the existing annuity was stated to be 1050*l.* without any notice of the former annuity: and it was held that this statement was sufficient. LITTLEDALE, J., there says: "It appears to me, that, as between these parties, the consideration for the annuity was the payment of 1050*l.* by

(a) *Rumball v. Murray*, 3 T. R. 298; *Berry v. Bentley*, 6 T. R. 690; *Pool v. Colman*, 8 T. R. 328.

(b) *Morris v. Wall*, 1 Bl. & P. 208.

the grantor to the grantee, although that payment was immediately followed by a transfer of part of the sum to the holder of a former annuity, which was then put an end to. I do not think it was requisite that the stipulation with respect to insurance should have been noticed in the memorial: the payment of it was contingent; it was no part of the 'annuity or rent-charge:' it was, in fact, a provision for securing payment of the annuity. *Wood v. Perrott*, 5 J. B. Moore, 63, is a strong authority in favour of the plaintiff. The cases cited in support of the present application were under the former statute, (17 G. 3, c. 26,) a statute which required a greater particularity of statement than the act now in force. As to the terms in which the nature of the instrument is described, I think they are sufficiently correct." *Drake v. Rogers*, 2 Brod. & Bingh. 19, 4 J. B. Moore, 402, was decided upon the old statute.

Telford and Byles, Serjts., in support of the rule. *Crossley v. Arkwright*, 2 T. R. 603; *Rumball v. Murray*, 3 T. R. 298; *Berry v. Bentley*, 6 T. R. 690; *Poole v. Cabanes*, 8 T. R. 328, and *Drake v. Rogers*, are distinct authorities to show, that, where part of the consideration for an annuity is paid in bank-notes or other notes, it must be stated in the memorial whether they are payable on demand or otherwise; and there is no substantial difference in this respect between the provisions [491 of the 17 G. 3, c. 26, and those of the 53 G. 3, c. 141; see the judgment of LITTLEDALE, J., in *Blake v. Attersoll*, 2 B & C. 875, 4 D. & R. 549. [CRESSWELL, J. In *Morris v. Wall*, 1 B. & P. 208, where part of the consideration was paid in country bank-notes, the court would not presume that they were payable on demand.] The value of the consideration might be materially affected by the dates. In *Drake v. Rogers*, 2 Brod. & Bingh. 19, 4 J. B. Moore, 402, the memorial stated the consideration to consist of Bank of England notes payable on demand, and of a draft payable at a banker's, but not specifying the time when so payable: the annuity had been paid eleven years, and the attesting witness and agent of the grantee were both dead: the court set aside the securities, on the ground that the memorial did not state when the draft was payable, or whether it had been in fact paid. DALLAS, C. J., in delivering the opinion of the court, said: "It is objected here that the memorial does not state when the draft for 65*l.* was payable, or whether it was ever paid, so that it is uncertain whether the grantor of the annuity ever received the whole of the consideration for it. In principle there is a reason why it should appear upon the face of the memorial when the draft was payable, and that reason is given in *Berry v. Bentley*. 'The objection was, that the memorial did not set forth when the note was payable, whether immediately or at a distant day; for, if at a distant day, it was not worth 700*l.*, by reason of the discount.' Now, the draft in this case might have been payable at a distant day, and the grantor might have lost so much of his consideration as the discount of the draft for the intermediate time might amount to. In substance, therefore, and on

principle, here is a ground why the time at which a bill is payable should appear on the memorial." *Cur. adv. vult.*

*492] *TINDAL, C. J., now delivered the judgment of the court.

This was a rule calling upon the executors of William Abbott to show cause why the warrant of attorney in this cause, and the judgment signed thereon, and the annuity deed and memorial in the defendant's affidavit mentioned, should not be respectively set aside, on the following grounds—first, that the consideration is not properly stated in the memorial of the said deed, as to the time of payment of the draft therein mentioned—secondly, that the consideration for the said annuity was an illegal assignment of an office—thirdly, that a part of the consideration money was retained—fourthly, that the deed contained a covenant to pay an additional premium of insurance in a certain event—fifthly, that it contained a covenant to allow the grantee to take one shilling in the pound of what he should collect from the fees of the said office.

The affidavit on which the rule was obtained stated that the consideration money for the annuity was 450*l.*, and was paid in manner following: 410*l.* in Bank of England notes, 17*l.* in gold coin, 23*l.* by a draft of even date with the annuity deed, drawn by the said William Abbott on Barnetts, Hoare, & Co., bankers, London. A copy of the memorial was annexed to the affidavit, and such memorial, under the heading "Consideration, and how paid," was in these words:—"The sum of 450*l.*, paid by the said W. Abbott, to the said J. E. M. Douglass in his own proper person, in manner following, that is to say, 23*l.* by a draft of even date with the aforesaid recited indenture of assignment, drawn by the said W. Abbott on Messrs. Barnetts, Hoare, & Co., 17*l.* in sovereigns, and the residue of the aforesaid sum of 450*l.*, being 410*l.*, in notes of *493] the Governor and Company of the Bank of England payable to bearer on demand, *and which said three several sums make the aforesaid consideration of 450*l.*."

In answer to the rule an affidavit was used, to which the said draft for 23*l.* was annexed; and it appeared to be a draft payable on demand.

It will be unnecessary to express any opinion upon the other objections taken, because it appears to us that the first must prevail, the memorial not being such as the statute 53 G. 3, c. 141, requires to be enrolled.

In order to determine this question, it is necessary to look at the statute 17 G. 3, c. 26, s. 1, and the decisions which took place under it. By that section it was enacted, "that a memorial of every deed, &c., whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, &c., shall, within twenty days of the execution of such deed, &c., be enrolled in the high court of Chancery; and that every such memorial shall contain the day of the month, &c., and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, *and* the consideration or considerations for granting the same,"

&c. Under that section it was held, that all considerations, whether pecuniary or otherwise, must be stated; and that, where a pecuniary consideration, or part of it, was paid by drafts on bankers, or promissory notes, it was necessary to set them out, and mention the time when they were payable: *Rumball v. Murray*, 3 T. R. 298; *Berry v. Bentley*, 6 T. R. 690; *Poole v. Cabanes*, 8 T. R. 328; in which last case the memorial stated that "part of the consideration money, 199*l.* 10*s.*, was paid by a draft of J. Harvey, on Messrs. Lockharts, bankers in Pall Mall, which said draft was duly honoured;" and, although it was urged by GRASS that a banker's check is always considered as *money, the court held the memorial to be insufficient. In *Morris v. Wall*, 1 B. & P. [*494 208, the memorial stated that "the consideration money was paid in Bank of England notes and country bank-notes," without specifying the dates and times of payment of the latter; and on the ground that it was necessary to state the time of payment, the court reluctantly made absolute a rule for setting aside the judgment, considering themselves bound by the former decisions respecting bankers' checks. And these decisions were confirmed by this court in *Drake v. Rogers*, 2 Brod. & Bingh. 19, 4 J. B. Moore, 402.

By the 53 G. 3, c. 141, s. 1, the 17 G. 3, c. 26, was repealed, except as to annuities and rent-charges theretofore granted: and, by the second section, it was enacted, "that, within thirty days after the execution of every deed, &c., whereby any annuity or rent-charge shall from and after the passing of this act be granted for one or more life or lives, &c., a memorial of the date of every such deed, &c., the *pecuniary* consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the high court of Chancery, *in the form or to the effect following*, with such alterations therein as the nature and circumstances of any particular case may require." By this enactment, it is not made necessary to mention in the memorial any but *pecuniary* considerations; but *they* must be stated in the form prescribed by the act, which contains a column headed "Consideration, and how paid," and under that heading these words: "100*l.* paid in money, 500*l.* paid in notes of the Governor and Company of the Bank of England, or other notes or bills of exchange, as the case may be." If, in the present case, part of the consideration had been paid by a bill of exchange, it could not have been contended that the time when it *would become payable need not have been stated; that being necessary to show the [*495 real nature and value of the consideration. The same necessity exists for stating the time when a *draft* is payable: and the only question is, whether the memorial now under consideration states the time when the draft upon Barnetts, Hoare, & Co. was payable. It does not do so, unless the word "draft" means draft payable on demand.(a) In several of the

(a) A bill in the form of a bill of exchange, drawn upon a banker, is commonly called a *draft*, or a *banker's draft*.

cases cited, the courts have refused so to construe it; and those decisions are equally applicable to memorials enrolled in pursuance of the 53 G. 3, c. 141, as to those under the 17 G. 3, c. 26. We feel that we are bound by them, and that we must say that the memorial in question is insufficient.

The consequence is, that the deed, bond, instrument, or other assurance by which the annuity was granted, is null and void.

The rule asks that they may be set aside; but the court will only interfere so far as to set aside the judgment signed on the warrant of attorney. To that extent the rule must be made absolute. Rule accordingly.

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*STEAD v. CAREY. April 30.

In case for an infringement of a patent, the defendant pleaded—that the invention in respect whereof the letters-patent were granted, was an invention stated and represented by the plaintiff, in applying for the letters-patent, to be, and was therein called and intitled “The invention of making or paving public streets and highways, and public and private roads, courts, and bridges with timber or wooden blocks”—that the letters-patent were granted for and in respect of the said invention, by and under the name, style, and title of “The invention of making or paving public streets and highways, and public and private roads, courts, and bridges with timber or wooden blocks;” and by and under no other name, style, or title—and that the said style and title was, in its claim, description, and definition of the said invention, too large, uncertain, ambiguous, and vague, and inconsistent, inapplicable, and at variance in respect of, to, and with the nature of the said invention as described and ascertained by the specification; by reason whereof the patent was void. The plaintiff replied, that the said letters-patent were granted for and in respect of a certain invention called and intitled “An invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber and wooden blocks,” and not for “The invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks:”—*Held*, that this was an apt traverse of the plea. By an act of parliament, (local and personal, (a) but to be judicially taken notice of as a public act,) reciting, that letters-patent had been granted to A.; that the specification was enrolled within six months instead of being enrolled within four months after the date thereof, as required by the letters-patent; that the letters-patent contained a proviso for making them void if they should become vested in, or in trust for, more than twelve persons; and that certain persons had agreed to form themselves into a company for the purpose of working the patent—powers were given for the formation of a company, and enabling the patentee to assign the patent to them, or to license them to work it. A subsequent section, reciting the non-enrolment of a specification within due time, and that such non-enrolment had arisen from inadvertence and misinformation, and that it was expedient that the patent should be rendered valid to the extent thereafter mentioned, enacted, that the letters-patent should, during the remainder of the term, be considered, deemed, and taken to be as valid and effectual to all intents and purposes as if the specification thereunder, so enrolled by A. within six months after the date thereof, had been enrolled within four months:—

Held, that the confirmation of the patent was unconditional, and was not dependent on the formation of a company.

The defendant further pleaded, that, before the passing of the act, and after the expiration of four calendar months next and immediately after the date of the plaintiff's patent, he obtained a patent for an invention of certain improvements in paving for covering streets, roads, and other ways; that his invention then applied to blocks of wood, and was a material and substantial and *bonâ fide* improvement of and upon the invention of the plaintiff; that the same could not be made, used, or exercised without at the same time making, using, and putting in practice the plaintiff's invention; and that, in the due and legitimate exercise and enjoyment of his patent, he necessarily and unavoidably used the plaintiff's invention:—*Held*, *bad on demurrer*; the operation of the statute being to effect a complete confirmation of the plaintiff's patent, and to preclude the defendant from using the plaintiff's invention, notwithstanding the grant to the defendant.

(a) 4 & 5 Vict. c. xci.

CASE, for infringement of a patent. The declaration stated that theretofore, to wit, before and at the time of the making of the letters-patent and the *committing of the grievances by the defendant as thereafter [497 mentioned, the plaintiff was the true and first inventor of the working or making of a certain manner of new manufacture within this realm, to wit, a certain invention for "making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks;" that her majesty the queen, on the 19th of May, 1838, granted to the plaintiff, his executors, administrators, and assigns, a patent for the making, using, exercising, and vending the said invention in England, Wales, and Berwick-upon-Tweed, and also in her majesty's colonies and plantations abroad for the term of fourteen years from the date of the grant; that it was by the said letters-patent, amongst other things, provided, that, if the plaintiff should not particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in her majesty's high court of Chancery within *four* calendar months next and immediately after the date of the said letters-patent, then the said letters-patent, and all liberties and advantages whatsoever by the said letters-patent granted, should utterly cease, determine, and become void, any *thing thereinbefore contained to [498 the contrary thereof in anywise notwithstanding; that afterwards, and before the committing of the grievances by the defendant as therein-after mentioned, he, the plaintiff, did particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, commonly called the specification, and afterwards, and within *six* calendar months next, and immediately after the date of the said letters-patent, to wit, on the 19th of November, 1838, did cause the said specification to be enrolled in Chancery, but the same was not enrolled in her majesty's high court of Chancery within *four* calendar months next and immediately after the date of the said letters-patent, in pursuance of the proviso in that behalf in the said letters-patent contained; that, after the making of the said letters-patent, and the enrolment of the said specification, and before the committing of the grievances by the defendant as thereafter mentioned, by a certain act of parliament made and passed in the session of parliament held in the fourth and fifth years of the reign of her present majesty, intituled "An act for forming and establishing Stead's Patent Wooden Paving Company, and to enable the said company to purchase certain letters-patent, and for confirming the same," (a) after reciting that the said specification of the above-mentioned letters-patent was enrolled *six* months after the date thereof instead of *four* months after the date thereof, as provided by the said letters-patent, it was enacted that the said letters-patent should, during the remainder of

the term of fourteen years, be considered as valid and effectual to all intents and purposes, as if the said specification so enrolled within *six* *499] months after the date of the said letters-patent, *had been enrolled *four* months after the date thereof. Breach, that the defendants, well knowing the premises, but contriving and wrongfully intending to injure the plaintiff, and to deprive him of the profits and advantages which he otherwise would have derived from the making, using, exercising, and vending of the said invention, after the making of the said act of parliament, and within the remainder of the term of fourteen years by the said letters-patent granted, to wit, on the 12th of October, 1843, and on divers other days and times between that day and the commencement of this suit, and within England, unlawfully and unjustly, without the leave, license, consent, or agreement of the plaintiff in writing, under his hand and seal or otherwise howsoever, in that behalf first had and obtained, and against the will of the plaintiff, *did make, use, and put in practice the said invention*, in breach of the said letters-patent, and against the privileges so thereby granted as aforesaid; and also, to wit, on the several and respective days and times last aforesaid, within England, unlawfully and unjustly, without the leave, &c., and against the will of the plaintiff, *did counterfeit, imitate, and resemble the said invention*, in breach, &c.; and also, to wit, on the several and respective days and times last aforesaid, within England aforesaid, unlawfully and unjustly, without the leave, &c., and against the will of the plaintiff, *did make divers additions to, and subtractions from, the said invention, whereby to pretend himself, and did then pretend himself, to be the inventor and devisor thereof*, in breach, &c.; and also, to wit, on the said several and respective days and times last aforesaid, within England aforesaid, unlawfully and unjustly, without the leave, &c., and against the will of the plaintiff, *did make, use, exercise, and vend divers, to wit, 100,000,000, pieces or blocks of wood for paving, in imitation of the said invention of the plaintiff*, *500] in breach *of the said letters-patent, and against the privileges so thereby granted as aforesaid. Whereupon the plaintiff says that he is injured, and hath sustained damage, &c.

Seventh plea—that the said invention in respect whereof the said letters-patent in the declaration mentioned were granted to and obtained by the plaintiff, was an invention stated and represented by the plaintiff, in applying and petitioning for the said letters-patent to be, and was in the said letters-patent called and intituled, “the invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks,” and the said letters-patent were granted and obtained for and in respect of the said invention by and under the name, style, and title of “the invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks,” and by and under no other name, style, or title; that the said style and title was and is in its claim, de

scription, and definition of the said invention, too large, uncertain, ambiguous, and vague and inconsistent, inapplicable, and at variance in respect of, to, and with the nature of the said invention, as described and ascertained by the said instrument in writing under the hand and seal of the plaintiff, and by him caused to be enrolled in her majesty's high court of Chancery, as in the declaration mentioned; by reason whereof the rights, liberties, privileges, benefits, monopolies, and advantages, in and by the said letters-patent purported to be granted, and the prohibitions therein purported to be contained, and by the said act of parliament in the declaration mentioned purported to be confirmed, were and continued to be from the time of the passing of the said act of parliament, and at the said several times when, &c., were, and still remained, wholly void and of no effect, and the same were and are wholly lost and *forfeited by the plaintiff; wherefore the defendant, at the said several times when, [*501 &c., in the declaration mentioned, did the several acts, matters, and things in the declaration mentioned, and therein alleged to have been done by him, as he lawfully might for the cause aforesaid—verification.

Replication to the seventh plea—that the said letters-patent in the declaration mentioned were granted for and in respect of a certain invention called and intituled “*an* invention of making or paving public streets and highways, *and* public and private roads, courts, and bridges with timber *and* wooden blocks,” and not for “*the* invention of making or paving public streets and highways, *or* public and private roads, courts, and bridges, with timber *or* wooden blocks,” in manner and form as the defendant had above thereof in that behalf alleged—concluding to the country.

Special demurrer, assigning for causes, that the title of the said invention, as stated and set out in the said replication, was insufficient to support a patent, the same being too large, vague, general, extensive, indefinite, and otherwise insufficient; that the said replication was inconsistent and nugatory, inasmuch as it substantially alleged and admitted in the inducement that which was denied by the traverse; that the inducement ought to deny argumentatively or indirectly that which the traverse denied directly, whereas the inducement related only to the title of the invention, and the traverse to the invention itself, its nature and description, and it by no means followed from the title of the invention being as in the replication was stated, that the letters patent were not granted for the invention of making or paving public streets and highways, or public and private roads, courts, and bridges, with timber or wooden blocks; that the replication traversed and denied matters not alleged in the plea, inasmuch as *it was nowhere in the seventh [*502 plea alleged that the said letters patent were granted for the invention of making or paving public streets and highways, or public and private roads, courts, and bridges with timber or wooden blocks, but that they were granted for the invention in the declaration mentioned by

that title, and if by the said replication to the seventh plea it was intended to deny that they were obtained for the invention in the declaration mentioned, or any invention by or under such title, then the said replication contained such denial argumentatively and by implication only, and did not formally deny the same; that the said replication was an informal traverse, containing in part affirmative matter, but not sufficiently distinguishing the same as matter of inducement; that the said replication was nugatory, and contained no answer to the seventh plea, inasmuch as, if the title of the said invention as in the said seventh plea mentioned and set forth was, as by the replication it was admitted to be, too large, uncertain, ambiguous, and vague, inapplicable, inconsistent, and at variance in respect of, to, and with the nature of the said invention as described and ascertained by the said instrument in writing under the hand and seal of the plaintiff, then the title in the said replication alleged to be the title of the said invention, must also be too large, uncertain, ambiguous, and vague, inapplicable, inconsistent, and at variance in respect of, to, and with the said nature of the said invention as described and ascertained as last aforesaid; that the said replication to the seventh plea was a departure from the declaration, and denied that the said letters patent were granted for the invention described and set forth in the declaration; and that the replication was in other respects uncertain, informal, and insufficient, &c.

Eighth plea—that it is enacted in and by the said act of parliament in *503] the declaration mentioned, to wit, *the said act of parliament made and passed in the 1 & 5 Vict., that the said act of parliament and the provisions therein contained should extend, and be construed to extend, to the said company called Stead's Patent Wooden Pavement Company, at all times during the continuance of the same, whether the said company had been, or was then, or should thereafter be, composed of all or some of the persons who were the original members thereof, or of all or some of those persons together with some other persons, or whether such company should thereafter be composed altogether of persons who were not original members of the same, or of persons all of whom should become members after the passing of that act; that the said persons in the said act of parliament mentioned, and thereby established and united into a joint-stock company by the name of Stead's Patent Wooden Paving Company, had not, nor had any of them, from the time of passing the said act hitherto, purchased the said letters-patent, nor had any of them save the said David Stead (the plaintiff) exercised, used, or vended the discoveries or inventions in the said letters-patent mentioned, or undertaken or carried on any trade or business connected therewith, or done any of the acts or things for the purpose whereof the said company was established, nor was there at the time of the passing of the said act, or at the said times when, &c., or any other time whatever, any such capital as in the said act mentioned and referred

to, nor had the said several persons, or any of them, held any share or shares of any joint-stock belonging to such company or such persons, nor had the said letters-patent been sold, transferred, granted, or assigned to the said persons, or any of them; and, although twelve months from the time of the passing of the said act of parliament had elapsed before the commencement of the suit, and before any of the said times when, &c., in the declaration *mentioned, no memorial of the names, residences, and descriptions of any directors or secretary of the said company, or of any shareholders thereof, at any of the said times when, &c., had been, or at any time since had been enrolled in the high court of Chancery, as by the said act required: that the said David Stead in the said act of parliament mentioned among the said persons so established and united into such joint-stock company, was the same David Stead who obtained the said letters-patent, and who is the plaintiff in this suit; and that no such company as in and by the said act was contemplated, and no company whatever under the name of "Stead's Patent Wooden Paving Company," had been formed, or had any existence, save as far as the said persons were established and united into such company by the said act; by reason of which several premises in that plea above mentioned, the said company called "Stead's Patent Wooden Paving Company" had not, at the said times when, &c., or any of them, any continuance or existence, and the said act of parliament and the provisions thereof had become and were, before and at the said times where, &c., wholly inoperative, and the said letters-patent wholly void; wherefore the defendant, at the said times when, &c. in the declaration mentioned, did the several acts, matters, and things in the declaration mentioned and therein alleged to have been done by the defendant, as he lawfully might, for the cause aforesaid—verification. [*504]

The plaintiff demurred generally to the eighth plea.

Ninth plea—as to the acts, matters, and things in the declaration first assigned as infringements of the letters-patent in the declaration mentioned—that, before the passing of the act of parliament in the declaration mentioned, to wit, the said act made and passed in the 4 & 5 Vict., and before the making, or the granting to the defendant, of the letters-patent *thereinafter mentioned, to wit, on the 29th January, 1839, the defendant was the true and first inventor of a certain manner of new manufacture within this realm, which others did not then, or at the time of making, or granting to the defendant, the letters-patent thereinafter mentioned to have been granted to him, use, to wit, an invention of certain improvements in paving or covering streets, roads, and other ways; that thereupon, before the passing of the said act of parliament, and after the expiration of four calendar months next, and immediately after the date of the said letters-patent in the declaration mentioned, to wit, on the day and year last aforesaid, our lady the now queen, by her letters-patent duly sealed, &c., and bearing date at West- [*505]

minster on the day and year aforesaid, to wit, the 29th July, in the second year of her reign, granted to the defendant the sole privilege of making, using, exercising, and vending the said invention in England, Wales, and Berwick-upon-Tweed, &c., &c., (setting out the letters-patent, with the usual proviso for the enrolment of a specification within four calendar months;) that afterwards, and before the doing of the acts and matters in the introductory part of the plea mentioned, he the defendant did particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, commonly called the specification, and afterwards, and within six calendar months next and immediately after the date of the last-mentioned letters-patent, to wit, on the 29th July, 1839, did cause the last-mentioned specification to be enrolled, &c.; that the letters-patent so granted to him the defendant as aforesaid, were not, nor are, nor was, nor is the said invention of the defendant, contrary to law, or mischievous to the state, by raising the price of commodities at home, or otherwise, or any hurt of trade, or generally inconvenient, and that the

*506] *same, from the time of granting the same hitherto, had been and still was in full force and effect; that the said invention consisted in the application and combination of certain forms of blocks of stone, wood, or other material, in the paving or covering of roads, streets, and other ways, and that the said invention of the defendant, then applied to blocks of wood, was a material and substantial and *bond fide* improvement of and upon the said invention of the plaintiff, and that the same could not be made, used, or exercised without at the same time making, using, and putting in practice the said invention of the plaintiff; that, from the time of the granting of the letters-patent so granted to the defendant as in that plea mentioned, and the enrolling the said specification by the defendant as aforesaid, hitherto, and before and after the passing of the said act of parliament, the defendant had constantly made, used, and exercised in that part of the United Kingdom of Great Britain and Ireland called England the said invention of the defendant, and applied the same to blocks of wood, under and by virtue of the letters-patent to him granted as in that plea mentioned, and in the due and proper and legitimate use, exercise, and enjoyment of the said license, powers, privileges, and advantages in and by the said last-mentioned letters-patent contained and granted to the defendant, and in so doing, after the passing of the said act of parliament, the defendant, at the said times when, &c., in the first count mentioned, did thereby necessarily and unavoidably make, use, and put in practice the said invention of the plaintiff, as he the defendant lawfully might for the cause aforesaid; which were the same acts, matters, and things in the declaration first assigned as infringements of the patent in the declaration mentioned, and whereof the plaintiff had above complained against the defendant—
verification.

Special demurrer to this plea, assigning for causes, that *it [507
 amounted to not guilty ; that it was an argumentative and indirect denial of the novelty of the invention ; that, while it admitted the infringement complained of in the declaration, it sought to avoid by setting up matter that was no answer to the action ; that, however great the improvement of the defendant's alleged invention upon the plaintiff's invention might be, the using, exercising, and putting in practice of the defendant's alleged improvement by the defendant was an infringement on the plaintiff's patent ; that the plea was an indirect and argumentative denial only that the plaintiff was the true and first inventor of the invention in the declaration mentioned ; that it was nowhere averred, with sufficient or any certainty, in the plea, that the plaintiff was not the true and first inventor of the invention in the said letters-patent of the plaintiff and in the declaration mentioned, or that the said invention of the plaintiff was not, at the time of granting the said letters-patent, a new invention as to the public use and exercise thereof within England.

Shee, Serjt., for the plaintiff. The replication to the seventh plea is sufficient. That plea alleges that the invention, in respect whereof the patent was granted to the plaintiff, was an invention represented by him in his application for the patent to be, and in the letters-patent called, "*The invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks,*" and that such title was too large and ambiguous. The replication states that the patent was granted *for and in respect of* a certain invention called and intituled "*An invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber and wooden blocks,*" and not *for* "*The invention of making or paving public streets and highways, and public and private*" [508
roads, courts, and bridges, with timber or wooden blocks," as in the replication alleged. The allegation was material, and is properly traversed.

The eighth plea is bad. It does not sufficiently avoid the breach which it confesses. [CRESSWELL, J. The plea means this—that the declaration, on the face of it, shows that, but for the provisions of an act of parliament, the patent is void, and it alleges that the plaintiff has not complied with the condition of the act.] The act referred to, 4 & 5 Vict. c. xci., appears from its title to have had three objects—the forming and establishing of a company to be called "*Stead's Patent Wooden Paving Company*"—the enabling of the company to purchase certain letters-patent—and the confirmation of the letters-patent. The 31st section recites that the specification under the letters-patent now in question "*was enrolled six months after the date thereof, instead of four months after the date thereof, as provided by the letters-patent ; that the non-enrolment in due time of such specification, arose from inadvertence, and wrong information given to Stead, the patentee, who was absent in foreign parts at the*

period of the expiration of four months after the date of the letters-patent; and that it was expedient that such letters-patent should, notwithstanding, be rendered valid to the extent and in manner thereafter mentioned ;” and it enacts “that the said letters shall, during the remainder of the term of fourteen years therein mentioned, be considered, deemed, and taken to be as valid and effectual to all intents and purposes as if the specification thereunder so enrolled by the said David Stead *six* months after the date thereof, had been enrolled *four* months after the date thereof.” By that section, the forfeited rights of the patentee are restored, without reference to the formation of any company. If that clause had stood first, there would have been no room for doubt; and

*509] its position in the act can make no difference in its construction.

The general preamble, and the whole scope of the act, show that the relieving the patentee from the consequences of his omission to enrol a specification within the proper time, and from the condition or proviso making the letters-patent void on the assignment of them to more than twelve persons, were objects that were quite independent of the formation of the proposed company. The third section is entirely an enabling clause: it empowers the company to purchase, and the patentee to sell and assign to them, the patent, “at such price, and upon such terms in all respects, as shall be thought fit;” evidently contemplating a negotiation which might or might not result in an agreement for the conveyance of Stead’s right to the company, and the independent existence of Stead as a patentee, if no agreement should be come to, or no company be formed. [TINDAL, C. J. Is there any saving of the intermediate rights of third persons?] None. If the legislature had intended that the restoration of the validity of the patent should depend upon the condition of a company being formed, it would have been easy to insert such a condition.

It does not clearly appear from the ninth plea whether the defendant intended to say that *his* invention was the same as, or different from, Stead’s. If the latter, then it is a mere argumentative and extended plea of not guilty. [CRESSWELL, J. The ninth plea confesses that the defendant put in practice the invention of the plaintiff: but states that the defendant’s invention was a material and substantial and *bonâ fide* improvement of and upon the invention of the plaintiff, and that the same could not be made, used, or exercised without at the same time making, using, and putting in practice the said invention of the plaintiff, and that, in the proper and legitimate exercise and enjoyment of his own patent, he necessarily and unavoidably used the plaintiff’s invention. *Manning*,

*510] *Serjt. The substance of the plea is, that the plaintiff’s patent was void at the time the defendant’s patent was taken out. CRESSWELL, J. If that be so you did not need a new patent. If the defendant’s patent does not include Stead’s invention, it cannot help the defence; and, if it does, the defendant’s patent is bad.] The declaration

charges an infringement of the plaintiff's patent after the passing of the act of parliament: and this the plea does not deny. [ERLE, J. The defendant alleges that he obtained his patent in the interval between the forfeiture of Stead's patent, and the obtaining of the act of parliament; and that his patent is not avoided by the act.] The plea does not show that the defendant's patent was obtained before the filing of the plaintiff's specification: if after, the invention was common property, and not the subject of a patent.

Manning, Serjt., (with whom was *Rew*,) for the defendant.(a) A material variation being alleged in the plea and admitted by the replication, the plea affords a sufficient answer to the action. The replication states that the letters-patent in the declaration mentioned were granted *for and in respect of* a certain invention called and intituled "*An invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber and wooden blocks,*" and not *for "the invention of making or paving public streets and highways, and public and private roads, courts and bridges, with timber or wooden blocks,"* in manner and form as the defendant had above thereof in that behalf alleged. It is a traverse of the plea commencing *with *et non*, instead of with an *absque hoc*, which are perfectly equivalent [511 terms.(b) The objections are, first, that there is no coherence between the inducement to the special traverse and the special traverse itself; and, secondly, that the special traverse is a departure from the declaration. It is a rule in pleading, that the inducement to the special traverse ought to afford an argumentative and explanatory denial of that which comes under the *absque hoc*. Here, in the inducement the patent is stated to have been granted *for and in respect of* a certain invention called and intituled "*an invention,*" &c., and the traverse is that it was *for "the invention,"* &c. The declaration speaks of an invention for making or paving public streets and highways, and public and private roads, courts, and bridges, with timber *or* wooden blocks, and in the replication it is "*an invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber and wooden blocks.*" [CRESSWELL, J. Is it not virtually and substantially the same, if the one may be used without the other? The plaintiff does not profess to set out the title of the invention in his declaration, but merely states what it is.] "*The invention*" and "*an invention*" may mean very different things: the one may include the entire invention of wooden paving, and the other only one of several modes of applying the invention.

TINDAL, C. J. Perhaps, in very strict grammatical construction, a difficulty might arise from the use of the word "*for.*" But, giving the lan-

(a) The points marked for argument on the part of the defendant as to this replication were, that it was bad, inasmuch as it substantially admitted all that was in that plea alleged; and that, if there was any real difference between the matter alleged and that denied in the replication, then the replication was a departure from the declaration.

(b) *Bennet v. Filkins*, 1 Wms. Saund. 21; *Walters v. Hodges*, 2 Lutw. 1625.

guage of the replication a reasonable intendment, I think that difficulty is got rid of by the concluding words, "in manner and form as the defendant has above thereof in that behalf *alleged;" for, when we look *512] at the plea, we find that the defendant himself has alleged the invention to be in the letters-patent called and intituled "*The invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks.*" The replication, therefore, is an apt traverse of the defendant's answer; for it, in effect, alleges that the patent was not taken out by that description, but by another. For these reasons, we think the replication to the seventh plea sufficient.

Manning, Serjt. The eighth plea affords an answer to the action. It begins with setting out the twenty-seventh section of the statute 5 & 6 Vict. c. xci., (a) and then avers that none of the events contemplated by the act had taken place, and that by reason thereof the act became inoperative and the letters-patent void. It has been contended, on behalf of the plaintiff, that the thirty-first section was intended to *revive* the letters-patent granted to Stead, and to indemnify him against the consequences of his negligence in not enrolling a specification within the period limited by the grant, irrespectively of the circumstance that the provisions of the act as to the formation of a company, might not be complied with. At the time that the act passed, the letters-patent granted to Stead on the 19th of May, 1838, had become absolutely void, by reason of the non- *513] enrolment of a specification *within the four months limited by the proviso. The enrolment, subsequently made, was perfectly immaterial. The public were at that time in full possession of the benefit of the alleged invention. The act is a mere private conveyance between the parties; and, though declared to be a public act, that is only for the purpose of evidence. In *Hesse v. Stevenson*, 3 B. & P. 565, it was expressly held that an act of parliament empowering a bankrupt patentee, his executors, administrators and assigns, to assign the right to a greater number of persons than allowed by the letters-patent, and declared to be a public act, does not enable either the bankrupt or his assignees to make a better title than they could have made before the act. The first section of this statute recites that Stead had omitted to enrol a specification within the four months limited by the letters-patent: but the recital passes by a material fact, viz., that another patent had in the mean time been granted to a third party. The act is in the nature of a bargain between Stead and the public, by which, in consideration of the advantages recited

(a) Which enacts, "that this act, and the provisions herein contained, shall extend and be construed to extend to the said Company called '*Stead's Patent Wooden Paving Company*,' at all times during the continuance of the same, whether the said company hath been, or be now or shall hereafter be composed of all or some of the persons who were the original members thereof, or of all or some of those persons together with some other persons; or whether such company shall hereafter be composed altogether of persons who were not original members of the same; or of persons, all of whom shall become members after the passing of this act."

in the preamble, the legislature granted to Stead, or rather to the intended company, certain privileges which they at that time did not, and could not, possess. The cure of the blot in Stead's title was to be effected by the formation of a company, to which, by sect. 3, Stead was empowered to assign all benefit of the letters-patent. [TINDAL, C. J. Is any period limited by the act for the formation of the intended company?] There is no direct provision to that effect: (a) but by sect. 19, it is enacted that *the company* shall, *within twelve months after the passing of the act*, cause to be enrolled in Chancery a memorial of the *names, residences, and descriptions of the directors and secretary for the time being of the company, and of the shareholders thereof. [TINDAL, C. J. That clause is directory only.] (b) By a non-compliance with it, the company merely lose the privilege of suing and being sued in the mode provided by the act. There is no restriction whatever as to the time at which Stead shall sell his rights to the company.] Taking the whole of the provisions together, it is evident that the legislature contemplated the formation of a company within twelve months at the latest; and that, in the event of no company being created, the patent should be void. [TINDAL, C. J. If the thirty-first and the third sections are compared, it seems clear that the purchase of the letters-patent by the projected company is not made a condition precedent to the revival of the grant. The third section contains provisions that are altogether inconsistent with the formation of a company.] It was not necessary that the company should purchase the right; Stead might grant licenses. But from the recital in the first section it appears that the resuscitation of the patent was conditional, taking effect only on the formation of a company. The twenty-seventh section shows that the provisions of the act were intended to be co-extensive with the formation of the company and its operations. [COLTMAN, J. Your construction might prevent the revived right accruing to Stead, by the default of the company.] The act does not contemplate the exercise of the right by Stead independently of the formation of a company.

TINDAL, C. J. I think it is impossible to read the thirty-first section of the act of parliament in question, without seeing that the letters-patent granted to Stead are thereby confirmed, *without any condition*. That section *has a preamble peculiar to itself, reciting that the specification was enrolled *six months* after the date of the letters-patent, instead of being enrolled within *four months* after the date thereof, as provided by the letters-patent; that the non-enrolment in due time of such specification arose from inadvertence, and wrong information given to Stead, the grantee, who was absent in foreign parts at the period of

(a) The third section enacts, "that it shall be lawful for the company to purchase, and also for the said David Stead, his executors, administrators, and assigns, at any time after the passing of the act, to sell," &c.

(b) As to clauses directory, and clauses imperative or essential, see *Rez v. Justices of Leicester*, 7 B. & C. 12, 9 Dowl. & R. 772.

the expiration of *four* months after the date of the letters-patent; and that it was expedient that such letters-patent should, notwithstanding, be rendered valid to the extent, and in manner, thereafter mentioned: and then it, in terms, enacts "that the said letters-patent shall, during the remainder of the term of fourteen years therein mentioned, be considered, deemed, and taken, to be as valid and effectual, to all intents and purposes, as if the specification thereunder, so enrolled by the said David Stead six months after the date thereof, had been enrolled within four months after the date thereof." No condition is thereby imposed as to any company being formed, or as to any sale of the patent by Stead, and purchase thereof by a company. The defendant is seeking to turn this collateral provision into a condition precedent. The construction he is contending for would operate this injustice; it would render the confirmation of Stead's grant liable to be defeated by the acts or default of persons over whom he has no control. I therefore think the eighth plea is bad.

The rest of the court concurred.

Manning, Serjt. The ninth plea alleges, that, before the passing of the act of parliament, and, consequently, at a time when the plaintiff's patent had ceased to have any validity, certain letters-patent were granted to the defendant for an invention of certain improvements in paving or covering *516] streets, roads, and other ways, and that the said invention of the defendant, then applied to blocks of wood, was a material and substantial and *bonâ fide* improvement of and upon the said invention of the plaintiff, and that the same could not be made, used, or exercised, without at the same time making, using, and putting in practice the said invention of the plaintiff. This is a private act, passed upon certain representations made to the legislature by the persons soliciting the act. Whether the clauses are obtained at the hands of the legislature by a *suppressio veri* or by a *suggestio falsi*, is immaterial. [CRESSWELL, J. It is something new to impeach an act of parliament by a plea stating that it was obtained by fraud.] In the case of *The Earl of Leicester v. Heydon*, Plowden, 398, where an act of parliament recited that A. was attainted of treason, and confirmed the attainder, and in fact A. was not attainted, it was held that the act was no estoppel to him, but that he might deny the attainder. In the argument of that case it was said, that, "if the reference to the record had been left out, and the act had absolutely recited that the plaintiff was attainted of treason, and had confirmed it, yet the plaintiff might say that he never was attainted of treason, and so avoid the act entirely; for, this recital cannot be taken to proceed, but upon information, and the court of parliament may be misinformed, as well as other courts, and, when they have recited a thing which is not true, it cannot be otherwise taken but that they were misinformed, for, none can imagine that they would purposely recite a false thing to be true; for it is a court of the greatest honour and justice, of which none

can imagine a dishonourable thing. And, forasmuch as the legislature always have justice and truth before their eyes, and their false recitals (if there are any) are made upon false information, from thence it follows that they do *not intend any one to be concluded by such recital [517 grounded upon falsehood, for, he that says to the contrary, affirms that their intent is to oppress men wrongfully; which is indecent to be said of them, and he who insists that some shall be concluded by such falsehood, impugns the intent of the makers of the act, and in that the act itself, for the act is nothing else but the intention of the makers of it." In Co. Litt. 360 a, it is said, that "acts of parliament are to be so construed as no man that is innocent or free from injury or wrong, be, by a literal construction, punished or endamaged." Again, Co. Litt. 381 b, Lord COKE, speaking of the statute of Gloucester, says: "The words of an act of parliament must be taken in a lawful and rightful sense; as, here, the words being 'whereof no fine is levied in the king's court,' are to be understood, whereof no fine is *lawfully* or *rightfully* levied in the king's court." So, in the case of *Alton Woods*, 1 Co. Rep. 48 b, it is said: "He who taketh a gift by act of parliament of any land, neither he nor his heirs shall be remitted; for, where land is expressly given to any person by act of parliament, which is a judgment, neither he nor his heirs shall have any other estate than is given by the act." So, here, although the act of parliament makes Stead's patent good, notwithstanding his failure duly to comply with the condition of enrolment, it has not the effect of remitting him to his former rights, but only operates to make the grant good from the time of the passing of the act. The contention on the other side would make the provisions of the act retrospective, for which there is no warrant. And in p. 53 a, the reporter goes on: "He took a difference between matter in fact and matter in law; as to matters in fact, it is true, these words(a) *imply that the king is not mis- [518 conusant of any matter of fact concerning his grant, but not of matters of law, as plainly appears by many cases cited by Mr. Attorney, that, if it appears to the court that (notwithstanding those words) the king was deceived in the law in the purpose and intent of his grant, his grant is void; and this agrees well with a text of the civil law upon these words, *de gratiâ speciali, certâ scientiâ, et mero motu, quod talis clausula non valet in his in quibus præsumitur, principem esse ignorantem*. And, therefore, in our case, the king hath granted such an estate as by law he could not grant; for, he hath granted an estate-tail in possession, where he could not by law grant an estate in possession, but for the term of his own life; and forasmuch as the king is deceived in the law, for this cause (notwithstanding the words *ex certâ scientiâ, &c.*) his grant is void. And, as to the rule which hath been taken, that the king's letters patent should not be void, if by any reasonable construction they may be maintained to be good, that is true, if the king's intent and purpose in his

(a) *De gratiâ speciali, certâ scientiâ, et mero motu.*

grant can take effect, and when the king is not deceived in his grant. As to the act of 28 Hen. 8, that doth not make the grant good, for two reasons—first, that act was made five years after the grant, and the act is, that the king *ex tunc et imposterum* (that is to say, from the time of the making of the act) shall have the manor in fee; so that, by the act, the king had not fee at the time of his grant, but five years after—secondly, the grant was void at first, and, therefore, the act doth not amend it.” Here, the parliament was deceived, inasmuch as they were not made aware of this defendant having, in the interval, acquired a vested interest in the subject-matter of *his* patent. In *Perry v. Skinner*, 2 M. & W. 471, it was held, that, where a patent is originally void, but amended under

*519] the 5 & 6 W. 4, c. 83, by *filing a disclaimer of part of the invention, that act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer. “The act of parliament,” says PARKE, B., “certainly is not very clearly worded; and it might seem, at first, that the construction to be put upon the words of it would be in favour of Mr. Rotch’s view of the case. The act enables any party to disclaim ‘any part of either the title of the invention, or of the specification, stating the reason for such disclaimer, or, with such leave as aforesaid, to enter a memorandum of any alteration in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters-patent, and such disclaimer or memorandum of alteration, being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters-patent, or such specification, in all courts whatsoever.’ The construction Mr. Rotch contends for is, that it shall be deemed and taken for part of the letters-patent as originally enrolled. The rule by which we are to be guided in construing acts of parliament, is, to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and, if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done. Now, if the construction contended for by Mr. Rotch was to be considered as the right construction, it would lead to the manifest injustice, of a party—who might have put himself to great expense in the making of machines or engines, the subject of the grant of a patent, on the faith of that patent being void—being made a wrong-doer by relation. That is an effect the law will not give to any act of parliament, unless the words are manifest and plain. We

*520] must engraft, therefore, a *modification* upon the words of the act in this case, for the purposes of its construction, and read it as though it had been ‘shall be deemed and taken as part of the said letters-patent, &c., from thenceforth,’ so as not to make the defendant a wrong-doer. The only doubt arising in this case, is, from the words of the proviso; but we cannot think the legislature meant

to do so unjust a thing as to restrict a party from doing that which he has a lawful right to do; and, therefore, though there is some obscurity in the words of the act, we are bound to put a reasonable construction upon them; and, undoubtedly, the effect of it is to make the patent good *for the future*." [ERLE, J. The effect of that case is this, that parties who have put in practice the invention in the interval between the forfeiture of the patent by the non-enrolment and the passing of the act, shall not be made wrong-doers by relation.] That is undoubtedly the effect of the particular judgment: the principle of the decision, however, goes much further. The rule is thus laid down by HALE, C. J., in *Lucy v. Levington*, 1 Vent. 176: "Every man is so far party to a private act of parliament as not to gainsay it, but not so as to give up his interest; it is the great question in *Barrington's case*, 8 Co. Rep. 136 b: the matter of the act there directs it to be between the foresters and the proprietors of the soil; and, therefore it shall not extend to the commoners, to take away their common. Suppose an act says, whereas there is a controversy concerning land between A. and B., it is enacted that A. shall enjoy it; this does not bind others, though there be no saving, because it was only intended to end the difference between them two." The same principle is laid down in *Buller and Baker's case*, 3 Co. Rep. 29, 30. So, here, there could have been no intention, on the "part of the legislature, to render void a patent previously granted to another, of the existence of which, it must be assumed, they were ignorant. The second patent must be held good as against persons claiming under the act, unless the court are prepared to say that the legislature would knowingly have disregarded the rights of the defendant, and sacrificed him for the purpose of enabling Stead's patent to be worked, whether by Stead himself, or by a company to whom he might convey his right, or to whom he might grant a license to exercise the invention. [*521

TINDAL, C. J. The difficulty I feel in acceding to the argument that has just been urged before us, is, that unless we give effect to the act of parliament in question as a complete confirmation of the plaintiff's patent, we give no effect to it at all. It is contended, that, by giving effect to the act as a confirmation of the plaintiff's patent, we impose upon the defendant the hardship of having his patent destroyed by an *ex post facto* law. I am free to admit that there may be some hardship in this. But the act operates equal hardship on the rest of the world; because, from the time that the plaintiff's alleged invention was thrown open to the public by his failure to comply with the condition upon which the grant was made to him, every individual had an equal right to put the invention in practice. Many persons besides this defendant may have invested their capital in establishments for the carrying out of the plaintiff's principle, upon the faith of his patent being gone: they would be injured to the same extent as the present defendant contends he is injured. If we were to hold that the plaintiff's patent is not good as against them, we

should be deciding in effect that it is not confirmed by the act. We cannot weigh the degree of injury one individual has sustained more than
 *522] another. *Besides, for any thing that appears to the contrary, this defendant may have been, at the time, compensated by private agreement. We should be speculating in a manner that we are not warranted in doing, if we were to say that any *suggestio falsi* or *suppressio veri* has been practised by the plaintiff in order to obtain this boon from the legislature. I think we are bound to give effect to the plain and obvious words of the act, and to hold that the plaintiff's patent is thereby confirmed and rendered valid to all intents and purposes. For these reasons, I think the ninth plea affords no answer to the action.

COLTMAN, J. I do not agree with my brother *Manning's* view, that this act of parliament is to be looked at as a mere private conveyance. Some acts are limited in their nature to the settlement of private rights and differences; as in *Lucy v. Levington*. But here, the act was intended to embrace a matter affecting the whole public,—to confirm to Stead a privilege, to the exclusion of the entire public, to use a particular invention. It does not, therefore, stand upon the footing suggested on the part of the defendant. And there is nothing in the act to enable us to except any individual or class from its operation.

CRESSWELL, J. I am entirely of the same opinion. I cannot see how the grant of the patent alleged in the ninth plea, in any degree alters the position or rights of the defendant. The queen, by granting one man a patent, does not grant him the privilege of invading the rights of another man; but merely prohibits others from invading the right that is exclusively granted to him. The defendant alleges in his plea that he has obtained a patent which he could not use without also using the plain-
 *523] tiff's invention. The plaintiff does not want to *use the defendant's invention, or in any way to obstruct or invade any rights which the defendant may have under it: but the act of parliament gives the plaintiff a right of action against any one who infringes *his* patent. So far as the plaintiff's patent is concerned, the defendant stands in precisely the same position as all the rest of the public. The defendant might as well have pleaded, that, after the plaintiff's patent had become void, and before the passing of the act, he had entered into certain contracts for the paving of certain streets according to the plaintiff's process. It was not competent to the queen, by her grant to the defendant, to derogate from the grant she had already made to the plaintiff: and the effect of the act of parliament is, to restore him to all the rights he had under the patent as originally granted to him.

ERLE, J. I am of the same opinion. The act of parliament gives to the plaintiff the same rights and privileges he would have enjoyed if he had enrolled a specification in due time. This may, it is true, work inconvenience to some: but that we cannot help. The legislature has pointed out the mode in which void patents may be rendered valid; and

no exception is made in favour of parties who have taken out patents in the intermediate time. If the defendant's patent included the plaintiff's invention, it would be void. If it was for an improvement only, he is not injured. At all events, he is not in a worse situation than the rest of the public.

Judgment for the plaintiff.(a)

Manning, Serjt., prayed leave to amend; but the court said, that after such a lengthened argument, and judgment pronounced, the application was too late.

(a) See *Stocker v. Warner*, ante, p. 148.

**HOMES v. LOCK.* April 30.

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In assumpsit for money had and received, a plea that the money was the amount of a prize in an illegal lottery held by the defendant, and that he paid over the amount to J. S., whom he conceived to be the winner, and who was entitled to receive and to retain the money, is bad for duplicity.

ASSUMPSIT, for money had and received to the use of the plaintiff, and for money found due upon an account stated.

Plea—as to 25*l.*, parcel of the moneys in the declaration mentioned, and the defendant's supposed promise in respect thereof as to that sum—that, before the time of the making of the supposed promise of the defendant as to the said sum of 25*l.*, parcel, &c., and before the commencement of the suit, to wit, on the 22d of April, 1844, he the defendant publicly at and in a certain place, to wit, the Feathers tavern, Duke street, St. James's, in the county of Middlesex, opened a certain lottery, the same being a lottery not authorized by parliament, contrary to the form of the statute in such case made and provided; that is to say, a Derby lottery, called, a Derby club, wherein the tickets or lots in the said lottery were to be denoted, to wit, by the names of certain horses then entered for a certain horse-race, to wit, the Derby, to be thereafter run at Epsom, in the year 1844; that the plaintiff and divers, to wit, seventy-four other persons, on the day and year aforesaid, became subscribers to the lottery so opened as aforesaid, upon certain terms, to wit, that each of the said subscribers should deposit with the defendant the sum of 1*l.* 10*s.* as his subscription to the said lottery; that, on the drawing of the said lottery by such subscribers, he who should be the drawer of the ticket or lot denoted by the name of the horse which should be first in the said race on the event of the running of the said race, should be entitled to receive of the defendant a large sum of money, to wit, 60*l.*, and which sum the *defendant then promised he would pay the [*525 said drawer; that he who should in the said drawing be the drawer of the ticket or lot denoted by the name of the horse which should be second in the said race in the event of the running thereof, should be entitled to receive of the defendant a certain other large sum of money,

to wit, 25*l.*, and which sum the defendant then promised he would pay to such drawer as last-mentioned, and that the sum of 15*l.* should be divided by the defendant amongst such of the said subscribers as should, on the occasion of the drawing of the said lottery, be the drawers respectively of the tickets or lots denoted by the names of certain other of the said horses which should be starters in the said race on the running thereof; the sum of 5*l.* per cent., nevertheless, to be deducted from the said sums of 60*l.* and 25*l.* respectively. Averment, that the drawing of the said lottery, afterwards, and before the said race, and before the commencement of the suit, to wit, on the 17th of May, 1844, took place publicly at the said public tavern, and on that occasion the plaintiff was the drawer in the said lottery of the ticket or lot denoted by the name of one of the said horses so entered to run in the said race, to wit, a horse named Ionian; that, afterwards, to wit, on the 22d of May, in the year last aforesaid, the said race was run by divers, to wit, twenty of the said horses so entered as aforesaid; and afterwards, to wit, on the day and year last aforesaid, and after the running of the said race, the defendant entertained a doubt whether one of the said horses, to wit, a horse called Orlando, which ran in the said race, or a certain other of the said horses which ran in the said race, that is to say, the said horse called Ionian, was the second horse on the occasion of the said running of the said race; whereupon, afterwards, to wit, on the day and year last aforesaid, *526] the defendant considered that the said horse called Orlando, *and not the said horse called Ionian, was the second horse in the said race; of all which premises the plaintiff then had notice; and thereupon, afterwards, to wit, on the 27th of May, in the year aforesaid, the defendant paid to one Robson, a subscriber to the said lottery, being on the occasion of the drawing of the said lottery, the drawer of the ticket or lot denoted by the name of the said horse called Orlando, the said sum of money so agreed to be paid to the drawer in the said lottery of the ticket or lot denoted by the name of the horse that should be second in the said race. Averment, that the defendant is sued in this action, so far as regards the said sum of 25*l.*, parcel, &c., in the introductory part of this plea mentioned, for and in respect of the sum of 25*l.* claimed by the plaintiff as a subscriber of and in the said lottery, and the drawer in the said lottery of the ticket or lot denoted by the name of the said horse called Ionian, which last-mentioned horse the plaintiff alleged to have been the second horse in the said race; and that the last-mentioned sum of 25*l.* so claimed by the plaintiff of the defendant as aforesaid, was and is the same sum of 25*l.* for and in respect whereof the defendant's supposed promise as to the said sum of 25*l.*, parcel, &c., was made, and was not nor is any other sum of 25*l.* whatsoever; and that, by reason of the premises aforesaid, the said supposed promise of the defendant as to the said sum of 25*l.*, parcel, &c., was and is void, the same being contrary to the form of the statute in such case made and provided—verification.

To this plea the plaintiff demurred specially, assigning for *causes*, that the plea did not sufficiently confess the cause of action to which it purported to relate, inasmuch as it did not confess a promise in fact, but treated the promise alleged in the declaration as a supposed promise only; that there was not therein sufficiently shown any matter of fact in avoidance of the said cause of action, *or in what respect the lottery in the said plea mentioned was illegal, or any facts showing that it was a lottery within the meaning of the statute alluded to in the said plea, but that the plea consisted altogether of what should properly be a mere inference of law deducible from facts which ought to have been shown therein, but were not so shown; that it merely averred that the lottery opened by the defendant was contrary to the form of the statute in such case made and provided, but did not show, in any sufficient way, in what respect it was so, and averred that the promise was void in law, and contrary to the form of the statute in such case made and provided; that it did not show that the race to be run was an illegal race; that it did not sufficiently confess and avoid, or directly traverse, any material fact mentioned in the declaration, but consisted of a merely argumentative denial that the defendant received the sum as to which the second plea was pleaded for the use of the plaintiff, and amounted to the general issue as to so much, inasmuch as the plea stated that the plaintiff and others subscribed certain sums of money upon certain terms, amongst others, that, under certain circumstances in the said plea set forth, certain of the subscribers should receive from the defendant certain sums of money which he promised to pay them, but did not distinctly state that those sums were to be paid out of the moneys so subscribed, or that the defendant was a stakeholder, but rather set out a collateral and independent promise to pay to the said parties certain specific sums of money on the happening of the said events respectively; that the plea was uncertain, in that it did not sufficiently appear therefrom whether the said contract entered into by the defendant was a contract by him as a stakeholder or was an independent and collateral contract; that the plea was double and multifarious, in this, that it set up more than one distinct answer to that part of the declaration to which it was pleaded: that is to say, it first denied the contract set forth in the declaration, and, secondly, set up the illegality of such contract, and, thirdly, it set up the defence that the defendant was a stakeholder—that, under the circumstances set forth, he in his judgment considered Orlando to have been the second horse—and that, after notice to the plaintiff of that fact, he the defendant paid over the 25*l.* in the plea mentioned to Robson, the holder of the ticket denoted by the name of that horse; that the plea confessed a cause of action to some amount, namely, a rateable proportion of the sum of 15*l.* therein mentioned as being distributable amongst the starters in the said race, but did not in any way avoid or answer the

said last-mentioned cause of action ; and that the plea was in other respects uncertain, informal, and insufficient. Joinder.

Channell, Serjt., (with whom was *Corrie*,) in support of the demurrer. The plea is bad, as amounting to non assumpsit. It is also bad for not sufficiently confessing the receipt of the money to the use of the plaintiff. It does not confess that *Ionian* was the second horse in the race ; which was essential to make the 25*l.* money received to the plaintiff's use. The plea is also bad for duplicity: it first sets up, by way of answer to the action, the illegality of the transaction, and next, that, having the 25*l.* in his hands as a stakeholder, the defendant paid it over to a third person, who was entitled to receive and to retain it: and the objection of duplicity is not the less fatal to the plea because one of the defences is ill pleaded. In *Stephens v. Underwood*, 4 New Cases, 655, 6 Scott, 402, to an action against the acceptor of a bill of exchange, the defendant *529] pleaded that he made the acceptance by *force and duress of imprisonment, and that he never had any value for accepting or paying the bill: and the plea was held ill, for duplicity. *TINDAL*, C. J., there said: "It appears to me that this plea is bad, for the cause assigned in the special demurrer, viz., 'that it contains two separate and distinct matters of defence, to wit, that the acceptance of the said bill was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment,—and, that there never was any value or consideration for the said acceptance.' The answer set up is, that it is not bad, because the second ground of defence is badly pleaded: but the plea is not the less double because one of the grounds of defence is badly pleaded. In *Comyns's Digest*, *Pleader*, (E. 2,) it is laid down that 'a double plea is bad, though one matter or the other be not well pleaded: as, in trespass, if the defendant pleads *molliter manus impossuit*, and a release, it is double, though the release is not well pleaded ; R. 1 Sid. 176. Though but one of the several matters pleaded be material. *Per Dod.*, (a) Poph. 186.' Here, notwithstanding the second branch of the plea would be ill on special demurrer, yet the entire plea is ill, for the cause assigned." This principle was also recognised in the recent case of *Purssford v. Peek*, 12 Law Journ., N. S., Exch. 103. There, in assumpsit by the endorsee of a bill of exchange drawn by S. B. upon, and accepted by, the defendant, the latter pleaded, that, after the bill became due, the said S. B. paid to the plaintiff the amount of the bill in money and work and materials, in full satisfaction and discharge thereof and of all damages, &c., which money and work and materials were accepted by the plaintiff in full satisfaction and discharge ; and further, that the defendant accepted the bill for the accommodation of the said S. B., and that there never was any consideration *or value for the payment thereof by the defendant, and *530] that the plaintiff, at the commencement of the suit, held, and now holds, the said bill without consideration or value: and the plea was held

ill for duplicity, although the latter allegation was bad on special demurrer. Lord ABINGER, C. B., there said: "I am disposed to think the plea double. The concluding part of it makes it so; and though, as a defence to the action, that part of it may be badly pleaded, it is not the less demurrable." And PARKE, B., said: "If the allegation had been, that the plaintiff had never held for value, the plea would clearly have been double; and I agree, that it is not the less so on account of its being badly pleaded." So, here, although the allegation in the plea of the payment of the money to Robson, in the belief that he was the party entitled to it by reason of Orlando, and not Ionian, being the second horse, might not stand the test of a special demurrer, still it creates a double defence, and would, at any rate, after verdict, be an answer to the action.

Murphy, Serjt., for the defendant, at the recommendation of the court, elected to amend, on the usual terms. Rule accordingly. (a)

(a) See *Allport v. Nutt*, and *Thorpe v. Coleman*, post.

*ROAKES v. DAVID MANSER the elder and DAVID MANSER the younger, Executors of WILLIAM MANSER, deceased. [⁵³¹
May 2.

Debt on bond conditioned for the payment of a sum of money and interest on a given day, and for the performance of covenants in an indenture. Plea, performance generally. Replication, that the obligors did not pay the money in the condition mentioned, *modo et formâ*, concluding to the country:—

Held, that the replication was proper, as taking issue on the payment impliedly alleged in the plea.

Held, also, that the plea was bad.

DEBT, on a bond in the penal sum of 2000*l.*, by the obligee against the executors of William Manser, one of the obligors.

The bond and condition were set out upon oyer; the bond being a joint and several bond given by one Frederick Barry, one James Barry, and William Manser, the testator, and the condition, that, "if the obligors, their heirs, executors, administrators, or assigns, did and should pay, or cause to be paid, unto the plaintiff, his executors, administrators, or assigns, the sum of 1000*l.* on or before the 30th September then next ensuing, together with interest for the same after the rate of 4*l.* 10*s.* per cent. per annum, without any deduction whatsoever, according to, and in full performance and discharge of, the proviso or condition mentioned in a certain indenture of assignment bearing even date therewith, made between the above-bounden Frederick Barry of the one part, and the plaintiff of the other part; and did also observe, perform, fulfil, and keep all and singular the covenants, grants, articles, conditions, and agreements whatsoever, which, on his and their parts and behalf, were or ought to be observed, performed, fulfilled, and kept, comprised and mentioned in

the said recited indenture, and that, in all things according to the true intent and meaning thereof, and of the parties to the same; then the obligation to be void, or else to remain in full force." The defendants then pleaded *non est factum*; and further, that the said Frederick Barry, James Barry, and W. Manser, the testator, in his lifetime, and the defend^{*532]} ants, as *executors aforesaid after the death of the testator Manser, did from time to time, and at all times after the making of the bond and condition, observe, perform, fulfil, and keep all and singular the articles, clauses, conditions, agreements, matters, and things in the said condition comprised and mentioned in all things therein contained, on their parts and behalf, and on the part and behalf of each and every of them to be observed, performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning of the said condition: Verification.

To the second plea the plaintiff replied that the said Frederick Barry, James Barry, and Manser, the testator, in his lifetime, and the said Frederick Barry, James Barry, and the defendants, since the death of Manser, the testator, did not pay the said sum of 1000*l.* in the said condition mentioned, in manner and form as in the said second plea mentioned—concluding to the country.

To this replication the defendants demurred specially, assigning for causes, amongst others, that it concluded to the country, and not, as it ought to have done, with a verification, inasmuch as it was not a mere traverse or denial of any fact or matter alleged or contained in the plea, but contained and alleged new and fresh matter, and that the plea secondly pleaded was a plea of general performance of the condition of the said writing obligatory, upon which plea no fit, proper, or certain issue could, according to the rules of good pleading, be taken, but the plaintiff ought, in answer to such plea, to have replied setting forth a breach or breaches of the said condition, and to have concluded such replication with a verification, in order that the defendants might have an opportunity of pleading to, and answering, such breach or breaches.

Bytes, Serjt., in support of the demurrer. The bond declared on is^{*533]} within the 8 & 9 W. 3, c. 11, s. 8; and it *appears, on oyer, that the condition is, for the payment of a sum of money, with interest, on a given day, according to, and in performance of, the proviso or condition mentioned in an indenture of assignment bearing even date with the bond, and for performance of the covenants in that indenture contained. Whether the money is to be paid to the obligee, or at a particular place named, the court cannot see, without having recourse to the indenture. The plea is a general plea of performance. The plaintiff was bound either to assign a breach or to reply specially to the plea; a *traverse* of the whole, or of any portion of it, being contrary to the rules of good pleading. In *Sayre v. Minns*, Cowp. 575, Lord MANSFIELD says. "I take this to be a rule in pleading, that you cannot go to issue *et*

general averment of performance: and the reason of this is, that the question may be brought to some degree of certainty, and notice given of what is intended to be agitated at the trial. When a particular breach is assigned, there is an affirmative offered on one side, upon which the other may take issue. But here there is a *general averment*; and no issue is offered by the replication." [CRESSWELL, J. There will, probably, be no dispute about that. Do you find any case of a plea of general performance, where the condition of the bond is, *inter alia*, for payment of a sum certain on a given day?] In Comyns's Digest, title *Pleader*, (2 V. 13,) it is laid down that "the defendant may plead performance generally, or a special performance." The law upon this subject is very fully discussed in *Hayman v. Gerrard*, 1 Wms. Saund. 101, et seq., and the notes thereto. That was an action of debt on a bond, conditioned to render an account of all such sums of money and goods as were due and belonging to W. N. at the time of his death, which should any ways come to the defendant's hands, and to make an equal *dividend of all such sums of money, &c., and to pay the plaintiff a proportion of the same: plea, that no goods came to the defendant's hands: replication, that a silver bowl came to his hands, concluding with an averment; whereupon demurrer. Adjudged that the replication was bad, for not assigning a breach, viz., that the defendant did not make a dividend or pay the proportion; but that the conclusion with an averment was proper. TWISDEN, J., cited a case where a man was bound to pay to the obligee 10*l.* upon the day of his marriage; and in an action upon the bond the defendant pleaded that the obligee was not married; and the plaintiff replied that he was married on such a day; and upon issue joined, and verdict given thereon, it was adjudged to be aided after verdict: "but," observed TWISDEN, J., "if the defendant had demurred, as here, it had been bad, as he said the opinion of the court then was." Upon this the reporter remarks: "The court said that the replication in this case was well concluded, and as it ought to be, *quod mirum videtur*; for it seems to me that the replication was bad upon that account." In the note (a) it is said: "In the report of this case in 1 Sid. 341, WYNDHAM, J., is said to have doubted whether the conclusion with an averment was improper, because he thought the matter of the replication was new, which might be answered by the other side. If the replication had, indeed, introduced new matter, the conclusion with an averment would certainly have been proper; as it is an established rule, that, whenever new matter is introduced, the pleading must conclude with an averment,(b) in order to give the other party an opportunity of answering it.(c)

(a) Page 103 a, n. (8).

(b) *Curry v. Stephenson*, Carth. 337; *Couper v. Towers*, 1 Lutw. 101; *Filewood v. Popplewell*, 2 Wils. 66; *Chandler v. Roberts*, 1 Dougl. 58, and the authorities there cited; *Henderson v. Wuby*, 2 T. R. 576.

(c) That is so, provided the new matter be affirmative matter. If it be merely new negative matter, although the conclusion should be to the court, a verification is unnecessary and is

*535] But, where there is an affirmative on the one side, and a negative on the other, or *vice versa*, the conclusion must be to the country. (a) And so it is, though the affirmative and negative be not in express words, but only tantamount thereto. (b) Though these rules are clear, yet, in the application of them, great nicety and attention to the cases on the subject are absolutely necessary. In *Trapaud v. Mercer*, 2 Burr. 1022, the court held the conclusion to the country to be proper, conceiving that there was a sufficient affirmative and negative, notwithstanding it was much insisted that the replication contained new matter. But, in a late case, (c) the authority of that case was rather shaken. That was debt on bond: on oyer, the condition, after reciting that the plaintiff had appointed the defendant his deputy customer for the port of Whitehaven, was, that the defendant should justly account half-yearly for and pay to the plaintiff, or such person or persons as he should appoint, all such fees, &c., as the defendant should thereafter receive in respect of his said office. The defendant pleaded a general performance. Replication, that the defendant received, in respect of his said office, fees due to the plaintiff to the sum of 335*l.*, which he ought to have paid, but had not paid, to the plaintiff, or to his appointment. Rejoinder—protesting against such receipt—that, before the defendant had and received the same, the plaintiff appointed A. B. to receive the fees which should become due to the plaintiff, and that he paid all fees so received to the

*536] said A. B., and concluded with an averment. Upon demurrer for this cause, it was objected that here was a sufficient negative and affirmative; that it was not necessary that they should be particular, for, where the plea of one party is general, the other need not be particular; that payment to the appointee was, in law, a payment to the principal himself, and it ought to have been so pleaded; and the above-mentioned cases of *Hayman v. Gerrard*, *Bayly v. Taylor*, Co. Litt. 126 a, and *Trapaud and Mercer*, were cited; and the last case was much relied upon, and pressed as directly in point. But the court, namely Lord KENYON, C. J., and ASHHURST and GROSE, Js., (*absente BULLER, J.*) held that the rejoinder contained new matter, namely, the appointment of A. B. to receive the fees, and so was rightly concluded with an averment, and seemed to doubt the authority of *Trapaud and Mercer*. In the present case, however, the replication does not introduce any new matter, but merely maintains the affirmative of that which is denied by the plea; and therefore it ought, agreeably to the above opinion of SAUNDERS, to have concluded to the country.” And in a subsequent note, it is said: (d) “According to the opinion of SAUNDERS, this case

is artificial. Co. Litt. 303 a; *Bodenham v. Hill*, 7 M. & W. 274, 8 Dowl. P. C. 662; *supra*, 375.

(a) *Charleston v. Finney*, Sir T. Raym. 98; *Skinner v. Kilby*, Carth. 87; *Roberts v. Marriot*, 2 Saund. 189.

(b) Co. Litt. 126 a; *Alexander v. Lane*, Yelv. 137.

(c) *Fearon v. Pearson*, T. T. 31 G. 3, K. B. MS.

(d) Page 103 d, n. (4).

has been denied to be law, in *Meredith v. Allen*, Carth. 116, where the court said that they, of their own knowledge, were satisfied that the case of *Hayman v. Gerrard* was not law, nor taken to be so at the bar, at the time when the judgment in that case was given. It would, indeed, be absurd to compel the plaintiff to assign a breach, when the plea itself admits a non-performance. The true distinction between those cases where it is necessary to assign a breach in the replication, and where not, seems to be taken by HOLT, C. J., in the same case of *Meredith v. Alleyn*, 1 Salk. 138, 'that, in all cases, (that of a bond to perform an award excepted,) if the defendant pleads a special matter that **admits and* [537 *excuses a non-performance*, the plaintiff need only answer and falsify the special matter alleged; for, he that excuses a non-performance supposes it, and the plaintiff need not show that which defendant has supposed and admitted; but, if defendant *pleads a performance of the condition*, though it be not well pleaded, the plaintiff in his replication must show a breach; for, then he has not a cause of action unless he shows one.''' In *Plomer v. Ross*, 5 Taunt. 386, it was held, that in debt on bond conditioned for the performance of covenants, if the defendant craves oyer and pleads performance of each covenant specially, and also general performance, the plaintiff must assign specific breaches in his replication, if he has not done it in his declaration; and, if he merely takes issue on the general performance, and enters a separate assignment of breaches on the record, no damages can be assessed on them, and the court will award a repleader.(a) That case shows, that where the defendant pleads general performance, the plaintiff must specially assign breaches in his replication. And this was so at common law, independently of the statute 8 & 9 W. 3, c. 11, sect. 8, which is imperative. [CRESSWELL, J. There are authorities to show, that, if the bond be conditioned for payment of money and performance of covenants, and the defendant pleads generally that he has paid the money and performed the covenants, a replication traversing the payment of the money is well concluded to the country. *Bush v. Leake*, 3 Dougl. 255, was debt on a bond conditioned for the payment of 5000*l.* at certain times, and performance of covenants in an indenture: the plea stated the payment of the money at the times, and performance of the covenants: the plaintiff replied that the defendant did not pay the money, *modo et forma*, and concluded to the country; and it was held, on **special* [538 *demurrer* assigning this for cause, that the conclusion to the country was good. And in *Turner v. McNamara*, 2 Chitt. Rep. 697, it was held that a plea—to a declaration on a bond conditioned, amongst other things, for the payment of 3000*l.*—that all the sums of money which became due on the bond were paid, may be replied to generally, by a general denial in the words of the plea, without assigning any specific breach.] In *Darbishire v. Butler*, 5 J. B. Moc:re, 198, to debt on

(a) Vide 7 M. & G. 616.

bond, the defendant cravedoyer, and, after reciting a mortgage-deed which showed the condition to be for payment of a sum of money on a day specified according to the tenor of the proviso contained in the indenture, and for the performance of the covenants therein, pleaded that there was no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisoes in the indenture on his part to be performed. The defendant in his replication took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes that the replication should have concluded with a verification, and that no breach of the condition had been assigned according to the 8 & 9 W. 3, c. 11, s. 8, it was held that the replication was good, the only point in issue being the payment of the money, and the plaintiff having therein denied the whole substance of the defendant's plea. That case, however, has been very much doubted. [CRESSWELL, J. Do you find any precedent of such a plea to an action on a bond conditioned for payment of money *and* the performance of covenants? TINDAL, C. J. I think the plea is bad in substance: and the case last cited seems to show *539] that the replication is good.] The only distinction between *Darbishire v. Butler* and the present case is, that there the plea alleged that the defendant paid the money mentioned in the condition on the day therein specified. [TINDAL, C. J. And that goes, in truth, to the substance of the action.]

Channell, Serjt., contrò. The plea is clearly bad unless it expressly, or by implication, alleges payment of the money according to the terms of the condition. It is of the very essence of the plea that it should appear that Manser, or one of the other obligors, paid the money. Now, it is a general rule, that the plaintiff in his replication must traverse some matter that is expressly alleged or necessarily implied in the plea; and, if he do so, his replication properly concludes to the country. It is said that the plaintiff could not properly take issue on this plea, but was bound to assign breaches under the statute 8 & 9 W. 3, c. 11, s. 8. That statute, however, has no application here. The replication does not tender an issue on the general allegation of performance: it takes issue on the implied allegation of payment of the money according to the condition, and therefore well concludes to the country. *Sayre v. Minns*, Cowp. 575; *Hayman v. Gerrard*, 1 Wms. Saund. 101, and the authorities cited in the notes to the latter case, are consistent with this mode of concluding the replication; and *Bush v. Leake*, 3 Dougl. 255, and *Darbishire v. Butler*, 5 J. B. Moore, 198, are distinct authorities to show that it is proper. The case last cited was confirmed in *Smith v. Bond*, 10 Bingham. 125, 3 M. & Scott, 528. If the plea does not contain the allegation that is traversed by the replication, it affords no answer to the action.

Byles, Serjt., in reply. A general plea of performance would. un-

doubtedly, be bad in the case of negative *or disjunctive covenants. If that had been the case here, the plaintiff might have set out the indenture and demurred. *Plomer v. Raine*, 4 East, 344, n. [*540 In *Bush v. Leake*, the attention of the court does not appear to have been called to the necessity of assigning a breach, or to the difference between a replication and other pleadings: and in *Smith v. Bond* the court seem to have thought that the case was not within the statute at all. Here, the plea, if objectionable, is clearly not so on general demurrer.(a)

TINDAL, C. J. It seems to me that the replication in this case is well enough. The action is brought upon a bond, the condition of which the defendant has set out on oyer; and it appears to have been conditioned for the performance by the obligors, their heirs, &c., of two separate and distinct matters: the one, that they should pay, or cause to be paid, unto the plaintiff, his heirs, &c., 1000*l.* on or before a given day, with interest, according to, and in full performance and discharge of, the proviso or condition mentioned in a certain indenture or assignment, bearing even date with the bond, and made between the principal obligor of the one part, and the obligee of the other part: the other, that they should observe, perform, fulfil, and keep all and singular the covenants, &c., on their part to be observed, comprised and mentioned in the indenture. In order to plead performance of that condition, the defendants should have taken issue upon the very words of it, and alleged that the testator (or one of the other parties to the bond) did, on the day named, pay or cause to be paid, unto the plaintiff the principal sum and interest, according to, and in full performance and discharge of, the proviso or condition in the indenture *mentioned; and then they should have gone on further to allege that the obligors did observe, perform, fulfil, and keep all and singular the covenants, &c., on their part to be observed, &c., comprised and mentioned in the indenture, and that, in all things according to the true intent and meaning thereof and of the parties to the same. Instead, however, of adopting that course, they have pleaded, generally, that the co-obligors and the testator, in his lifetime, and the defendants as executors after his death, did, from time to time, and at all times after the making of the bond and condition, observe, &c., all and singular the articles, clauses, conditions, &c., in the said condition comprised and mentioned, in all things therein contained, on their parts and behalf, and on the part and behalf of each and every of them, to be observed, performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said condition—concluding with a verification. This is a plea which, in strictness and propriety, I think the defendants ought not to have been allowed to plead. The authorities seem to me to be clear to that effect. Lord Chief Baron COMYNS, in his Digest, title *Pleader*, (2 W. 33,) lays it down, that, “if the condition of the bond be, to do several things, the defendant cannot plead perform- [*541

(a) See *vide infra*, 542.

ance generally, though all are in the affirmative, but shall answer specially to every particular:" for which he cites 1 Lev. 303, Kel. 95 b, and 1 Sid. 215. If, therefore, the plea in this case had been a proper plea of performance of the condition, it would have contained a distinct allegation of payment of the money on the day specified: and, although this may be a defect that should have been pointed out as a cause of special demurrer, still, I think the defendants ought not to be placed in a better *542] position than if they had pleaded a formal and *proper plea.^(a)

Upon this record it may be taken as if the plea had expressly alleged that the money was paid on the day provided by the condition: and that brings it within the cases of *Bush v. Leake*, *Darbishire v. Buller*, and *Smith v. Bond*. In an action upon a money bond, no breaches need be assigned: ^(b) and, if the plaintiff in the present case is content to rest upon the issue as to the payment of the money, no fresh breach need be assigned. Taking it, therefore, that the plea affirmatively alleges payment of the money, I do not see how this case differs from those cited. On the ground, therefore, upon which it is put in *Bush v. Leake*, namely, that it is impossible that any traverse can be taken except upon the single point of payment, I think the replication in the present case is good, and well concluded to the country; and consequently that judgment must be for the plaintiff.

COLTMAN, J. I am of the same opinion. It seems to me that the plea would be defective on *general* demurrer. It must, however, be assumed to allege, impliedly, that the money was paid on the day stipulated; ^(a) and the cases of *Bush v. Leake* and *Turner v. M^r Namara* show, that, if that allegation had been expressly contained in the plea, a replication traversing the payment generally, and concluding to the country, would have been good.

CRESSWELL, J. The observations made by the Lord Chief Justice exhaust the subject: it is, therefore, enough for me to say that I entirely concur in them.

ERLE, J., concurred.

Judgment for the plaintiff.

(a) See *Hobson v. Middleton*, 6 B. & C. 295, 9 D. & R. 249.

(b) *Smith v. Bond*, 10 Bingh. 125, 3 M. & Scott, 528; *James v. Thomas*, 5 B. & Ad. 46, 2 N. & M. 663. But where the principle is payable by instalments, breaches are to be assigned in the declaration or in the replication, or suggested on the record. *Willoughby v. Swinton*, 6 East, 550, 2 J. P. Smith, 663.

GOULD v. COOMBS. May 3.

[*543]

B, C, D. and E. gave a joint and several promissory note to A. for 200*l*. and interest, as security for a loan to A. On the death of E., B. obtained the note from A. for the purpose of procuring the signature of an additional party; and, to secure its return B. and C. signed the following document:—"I O Mr. A. the sum of 200*l*. for value received." The note was returned from B. to A., with the name of F. added, but the I O U was not given up. The alteration was made with the assent of all parties.

Quere, whether the addition of the fifth name was such a material alteration as to avoid the note!

Assuming it to be so:—*Held*, in an action by A. against B., that, inasmuch as the note was free from objection at the time the I O U was given, it was admissible in evidence in support of a count upon an account stated by the I O U.

And that, A. assenting to a verdict being entered against him upon the count on the note, he was entitled to a verdict for 200*l*. on the account stated, although the particulars of demand merely alleged that the action was brought to recover the amount of the promissory note.

Held, also, that the insertion of the words "*for value received*" did not render the I O U liable to a note, or to an agreement, stamp.

ASSUMPSIT, by the payee against one of the makers of a joint and several promissory note for 200*l*. and interest, payable on demand. The declaration contained a count upon the note and a count upon an account stated. The particulars of demand were as follows:—"This action is brought to recover the amount of the promissory note in the first count of the declaration mentioned, with interest thereon to the day of payment."

The defendant pleaded, to the first count, that he did not make the note, and, to the second, non assumpsit.

The cause was tried before COLTMAN, J., at the first sitting in Middlesex in Hilary term last. It appeared, that on the 1st of February, 1841, the plaintiff lent 200*l*. to one James White, to secure the repayment of which he took a promissory note in the following form:—

"£200 0 0.

"Glastonbury, Feb. 1st, 1841.

"We jointly and severally promise to pay Mr. John *Gould, [544
or order, two hundred pounds, with lawful interest, for value received.

(Signed) "JAMES WHITE.

"JAMES COOMBS.

"JOSEPH WHITE.

"ROBERT WHITE."

In June, 1843, Robert White, one of the parties to the note, having died, the plaintiff required another surety to be substituted. The plaintiff accordingly gave the note to James White, the principal debtor, in order that he might procure the signature of another party; and to secure the return of the promissory note, James White gave the plaintiff an I O U as follows:—

"I O Mr. John Gould the sum of two hundred pounds *for value received*. June 7, 1843.

(Signed)

"JAMES WHITE.

"JAMES COOMBS."

James White, having obtained the signature of one Mary White to the note, returned it to the plaintiff, who promised to destroy the I O U. The alteration in the note was made with the assent of the defendant. Upon its being tendered in evidence in support of the issue on the first count, it was objected, on the part of the defendant, that the addition of the new name was such a material alteration as to avoid the note; and *Clerk v. Blackstock*, Holt, N. P. C. 474, and Bayley on Bills, 5th edit. p. 102, were cited.

On the other hand it was insisted that the addition of the name of Mary White did not affect the defendant's liability upon the note: and *Catton v. Simpson*, 8 Ad. & E. 136, 3 N. & P. 248, was cited. There, the defendant and plaintiff gave a joint and several promissory note to A., the plaintiff signing as the defendant's surety. Afterwards, A. pressing the *defendant for payment, time was allowed upon L. adding his signature as additional security. No new stamp was put on the note. The plaintiff afterwards paid A. the money: and it was held that he might sue the defendant for money paid, and that the payment was not voluntary, the addition of L.'s name not annulling the plaintiff's original liability on the note. In that case the court said: "In the absence of all authority, we shall hold that this was not an alteration of the note, but merely an addition which had no effect."

It was further insisted on the part of the defendant, that the I O U, which was offered in support of the second count, was inadmissible, inasmuch as either it was a promissory note or it was an agreement, and, if the latter, was void for want of an agreement stamp, and as a special promise given for the debt of a third party, without consideration apparent on the face of it.

Both objections being overruled, a verdict was found for the plaintiff, damages 209*l.*, the amount of the note and interest; but leave was reserved to the defendant to move to enter a nonsuit.

Byles, Serjt., in Hilary term last, accordingly obtained a rule nisi to enter a nonsuit or a verdict for the defendant, or for a new trial.

Kinglake, Serjt., now showed cause. As to the first point, he submitted that the addition of the name of Mary White did not avoid the note, inasmuch as the liability of the defendant was in no degree varied by it: *Master v. Miller*, 4 T. R. 320; *Catton v. Simpson*, 8 Ad. & E. 136, 3 N. & P. 248; *suprà*, 544; *infra*, 546, 549: and further, that, if a material alteration, the objection should have been specially pleaded. *Sweeting v. Halse*, 9 B. & C. 365, 4 Mann. & Ryl. 287; *Hemming v. Trenery*, 9 Ad. & E. 926, 1 P. & D. 661; *Mason v. Bradley*, 11 M. & W. 590; *Davidson v. Cooper*, 11 M. & W. 778.

Upon the second point, he insisted that the I O U was a distinct acknowledgment of a subsisting debt of 200*l.* in respect of which the defendant himself was primarily liable, and, consequently, that it was evidence to support the count upon an account stated; and that it was not

the less an acknowledgment of a subsisting debt by reason of the agreement that it was to be destroyed on the note being restored to the plaintiff: and he distinguished the case of *Teal v. Auly*, 2 Bro. & B. 99, 4 J. B. Moore, 542, on the ground that in that case there was no acknowledgment of a precise and definite sum being due.

Byles, Serjt., (with whom was *Prideaux*,) in support of the rule. The addition of the fifth name to the note was a material alteration, which, if made without the consent of the parties to be affected by it, would have avoided the note at common law, and, if with consent, rendered it void under the stamp act. The added party might, by a part-payment, take the case out of the statute of limitations, and so materially affect the liability of the original makers of the note. Alterations of a much more serious nature have been held sufficient to destroy the validity of bills or notes; Bayley on Bills, 5th edit. p. 112; *Clerk v. Blackstock*, Holt, N. P. C. 474; *Calvert v. Baker*, 4 M. & W. 417. In the case of a deed, any material alteration, whether made by a party to it or by a stranger, renders it void: *Pigot's case*, 11 Co. Rep. 26 b; *Zouche v. Claye*, 2 Lev. 35; *Davidson v. Cooper*. *Catton v. Simpson*, 8 Ad. & E. 136, 3 N. & P. 248, was decided upon the ground that the added party was not liable on the note, and, *therefore, that the character of the instrument [547 remained unaltered. That case is clearly irreconcilable with all the other authorities.

This objection is not one which it is necessary to plead specially: the alteration of the note with the consent of the parties did not destroy the original contract, but, at the most, only prevented its being given in evidence. *Calvert v. Baker*, 4 M. & W. 417, is a distinct authority to show that this defence is good under such a plea as here pleaded.

Then, the I O U amounted to a promissory note within the statute of Anne,^(a) and might have been declared upon as such: it shows—value passing, the parties between whom it passed, and the specific amount of the debt. [CRESSWELL, J. Does not every I O U import the same? It imports consideration; and there must be a debt. Suppose, instead of the words “for value received,” the words “for wine” or “for a horse” had been added, would it not have been evidence?] Assuming that it was a simple I O U only, the plaintiff was precluded, by the form of his particulars, from relying on it in support of the account stated. In *Roberts v. Elsworth*, 10 M. & W. 653, 2 Dowl. N. S. 456, the declaration contained two counts, on two promissory notes for 50*l.* each, and also a count on an account stated: the particulars of demand stated that the plaintiff sought to recover 50*l.*, the amount of the note in the first count, and 50*l.*, the amount of the note in the second count, for the recovery whereof he would avail himself of the whole or any part of the declaration. No evidence was given in respect of the promissory notes: and it was held, that, under the above particulars, an admission by the

(a) 3 & 4 Ann. c. 9, s. 1, made perpetual by 7 Ann. c. 25, s. 3.

defendant that he owed the plaintiff 100*l.*, could not be given in evidence *548] in support of the account stated. *[ERLE, J. The ground of decision there was, that the statement of the account had no relation to the particulars.] Then, if the form of the particulars be sufficient, the note being excluded from the view of the jury, there was no evidence of any acknowledgment of a debt to support the account stated. [CRESSWELL, J., referred to *Smart v. Nokes*, 6 Mann. & Gr. 911, 7 Scott, N.R. 786. There, to debt, for money lent, interest, and money due on an account stated, the defendant pleaded—never indebted, and payment: at the trial the plaintiff put in a memorandum written by the defendant, containing an admission of a debt of 1000*l.* due to the plaintiff; but the memorandum also contained a statement that part of the debt had been paid in cash, and the rest by a bill at four months: and it was held that it was competent to the plaintiff, in order to obviate the inference arising from the memorandum that the whole debt was satisfied, to give in evidence the supposed bill, though on an insufficient stamp.]

COLTMAN, J.(a) Assuming the note in question to be rendered void by the alteration that was proved to have been made in it, it appears to me,—considering the time to which the account stated is to be referred, to have been a time when the note was a valid note,—that there can be no objection to its being admitted as evidence to show the then state of things. Whatever may be the case now, it was, at that time, free from objection. It has been contended, on the part of the defendant, that the subsequent alteration of the note precluded the plaintiff from using it in support of his claim under the second count. It does not, however, appear to me that that circumstance disentitled the plaintiff to produce the *549] note as evidence of an account stated. The *note proved a debt of 200*l.* due from the defendant to the plaintiff at the time the I O U was given, and therefore the account is properly an account stated as of a debt due from the defendant. On this ground, it seems to me that the plaintiff was entitled to a verdict on the second count. If he is content to relieve the court from the necessity of considering the question as to the effect of the alteration of the note,—upon which they are unwilling at present to express any opinion, seeing that there is a decision of the court of King's Bench (b) that appears to be at variance with some of the other authorities on the subject,—the verdict will be entered for the defendant on the first count, and for the plaintiff on the second, for 200*l.*

Kinglake, on behalf of the plaintiff, assented to this suggestion.

CRESSWELL, J. My brother *Kinglake* having consented to give up the first count, I shall offer no opinion as to whether or not the alteration of the note, by adding the name of a stranger, affected its validity. In order to show what the I O U was given for, the plaintiff produced at the trial *

(a) Tindal, C. J., was engaged on the crown jewels case.

(b) *Cotton v. Simpson*, 8 Ad. & E. 136, 3 N. & P. 248.

promissory note which, *prima facie*, supported the first count. Evidence was then given on the part of the defendant to show that the note had been altered in a manner that was contended to be so material as to render it void as a promissory note. It was clear that the I O U given referred to that note. That being so, I think we cannot reject the evidence of the promissory note in support of the account stated, and consequently that the plaintiff is at all events entitled to a verdict on that count for the sum mentioned in the I O U.

ERLE, J. I also am of opinion that the plaintiff is entitled to a verdict on the count upon an account *stated. We must look at [550 this case as if the declaration had consisted of that count only. The answer of the defendant would be, that the I O U was not given in respect of a primary, but of a collateral liability; and I am inclined to think, with my brother *Byles*, that, if it was a collateral liability only, it would not support the account stated. But I think the plaintiff was entitled to give in evidence the promissory note, in order to show that the parties who signed the I O U were, at the time, under the liability of principal debtors; and, though it may not be available to entitle the plaintiff to recover on the first count, it clearly may be looked at for the purpose of seeing the state of things at a time when the note was free from objection. Recourse is usually had to the account stated where the proof on the other counts fails in respect of the original cause of action. For these reasons, without entering upon the discussion of the other question, I concur with the rest of the court in thinking that the plaintiff is entitled to a verdict for the 200*l.* on the second count.

Byles, Serjt., submitted that the court could not, without consent, direct a verdict for the plaintiff on the second count,^(a) but that there should be a new trial.

CRESSWELL, J. Where the declaration contains two counts, and evidence is received which, as to one of them, is inadmissible, but which does not affect the plaintiff's right to recover upon the other, I am not aware that the defendant is entitled to a new trial. We decide upon the ground that the promissory note was clearly admissible on the second count.

Rule absolute to enter a verdict for the plaintiff on the second count, and for the defendant (by consent) on the first count.

(a) See *Moore v. Tuckwell*, post, p. 607.

*551]

*ALLEN v. RAWSON. May 3.

A. obtained a patent for "improvements in the manufacture of woollen fabrics, or fabrics of which wools, furs, or hairs, are the principal ingredients, as well as for the machinery used therein." In the specification, the main object of the inventor was stated to be "the making of cloth by felting alone, without spinning or weaving;" and the principal feature of it to be, the "obtaining a long, even, and uniform bat of wool or other materials of any required length, width, or thickness, suitable to be made into commercial ends or pieces of cloth." The specification described the mode of producing cloth by felting, by receiving the sliver direct from the carding-engine, between two long revolving aprons, and placing it in successive folds, until the required thickness was attained: it then described the process of felting, and the machinery used for that purpose, recommending the use of soap and water in combination with rollers, in preference to acidulated water, as theretofore used, and proceeded as follows:—"In order to increase the felting action, it is very desirable to allow the felting-rollers to act upon the cloth in as many directions as possible. By the reciprocating motion of this machine, we have seen that this action is produced, in each direction, longitudinally; and, in order to do this in other directions, the cloth is taken from the last machine and placed in the entering end of another similar felting-machine; but, instead of being entered as before, the piece is first passed between two feeding-rollers, T., one of which is shown in figure 20, and which are placed at an angle with the feeding-apron, of near forty-five degrees. These two rollers have a velocity of from three to four times that of the feeding-apron, upon which the cloth is thrown in regular folds as it enters, lying at nearly the same angle as the position of the rollers. This now causes the action to take place diagonally across the piece of cloth, and, after having passed through in this direction, it is reversed, and, when again passed, the action is nearly at right angles with the last." The specification then proceeded to describe a raising-machine, the raising cylinders of which are placed in a diagonal position, "one acting from one of the lists towards the other, and the other in the opposite direction."

The patentee claimed (amongst other things) the application of the compound apron, and the extended sliver itself as described in the specification, applied to forming a bat by successive folds or layers, for the production of long or commercial ends of cloth, without spinning or weaving; and also the diagonal or cross-felting as before described; the diagonal position of the raising-cylinders; and the use of soap and water, in combination with the rollers, in lieu of acidulated water.

Prior to the date of the patent in question, B. obtained a patent for "improvements in the manufacture of hosiery, shawls, carpets, rugs, blankets, and other fabrics." In his specification, B. described a mode of cross-felting,—which was stated by one of the defendant's witnesses to be substantially the same in principle as that described by A., as follows:—"The rollers, R., are made to traverse across the semi-cylinders; and, after passing many times across them, so as thoroughly to roll the bat horizontally, the rollers should be lifted up, by means of straps attached to their ends, and by suitable machinery placed above the same, and the position of the rollers should then be shifted, so as to make them travel angularly, first, several times in one direction, and afterwards, by being again properly shifted, from angle to angle, in the opposite direction." Both soap and water had been used before in felting, and rollers also, but not in combination:—

Held, that the claims in the specification in respect of the formation of a bat by the extended sliver as therein described, the raising-machine, and the method of cross-felting, were not too large.

Held, also, that the claim for the use of soap and water in conjunction with the rollers, was well founded.

The adoption by an inventor of a suggestion made in the course of experiments, of something calculated more easily to carry his conceptions into effect, does not affect the validity of the patent.

CASE, for an alleged infringement by the defendant of a patent for "improvements in the manufacture of woollen fabrics, or fabrics of which
*552] wools, furs, or *hairs are the principal components, as well as for the machinery used therein," granted to one J. R. Williams, on the 14th of February, 1840. The declaration, after setting out the let-

ters-patent, averred that Williams, within the time in that behalf limited, caused a specification to be enrolled in Chancery; and that Williams, on the 1st of January, 1844, assigned all his right and interest in the patent to the plaintiffs. The breaches assigned were—that the defendant, without the leave, and against the will of the plaintiffs, did use and put in practice the said invention of Williams, by felting, manufacturing, and making divers, to wit, 20,000 yards of cloth, 20,000 yards of woollen cloth, and 10,000 yards of other fabrics, of which wool formed a principal component part, on the said improved plan and principle of Williams, and in imitation of the said invention, in breach of the said letters-patent, and against the privileges granted to Williams and his assigns as aforesaid—that the defendant, without the leave, &c., of the plaintiffs, did felt, manufacture, and make and vend (a) *divers, to wit, 20,000 yards of cloth, 10,000 yards of woollen cloth, and 10,000 yards of other fabrics, of which wool and fur formed principal component parts, on the said improved plan and principle of the said invention, in breach, &c.—that the defendant, without the leave, &c., of the plaintiffs, did counterfeit, imitate, and resemble the said invention, and did make divers colourable additions thereto and subtractions therefrom, whereby to pretend himself the inventor and deviser thereof, and did then put in practice the said inventions, additions, and alterations as aforesaid, and pretend himself to be the inventor and deviser of the said invention of Williams, in breach, &c.—that the defendant, without the leave, &c., of the plaintiffs, did felt, manufacture, and make divers, to wit, 20,000 yards of cloth with certain other improvements in the progress of such felting, manufacturing, and making, which were then intended to imitate and resemble, and which did then imitate and resemble, the said invention of Williams, and thereby counterfeited the same, in breach, &c.—and that the defendant, without the leave, &c., of the plaintiffs, did use and put in practice the said invention, to wit, by then using and employing the improved machinery in the said letters-patent mentioned, in manufacturing and making divers, to wit, 20,000 yards of cloth, and 20,000 yards of woollen cloth, on the said improved plan and principle of Williams, in breach, &c.: by means of the committing of which grievances by the defendant as aforesaid, the plaintiffs had been and were greatly injured, and had lost and been deprived of divers great gains and profits, which they might, and otherwise would, have derived from the said invention and the said letters-patent, &c. [*553]

The defendant pleaded, amongst other pleas—Not guilty—that Williams was not the true and first inventor of the said invention, *modo et forma*—that the said *invention was not, before and at the time of the making of the said letters-patent, a new invention as to the public use and exercise thereof within this realm—and that the in- [*554]

(a) As to vending, see *Minter v. Williams*, 4 A. & E. 251, 5 N. & M. 647; 1 Webster, P. C. 133.

vention in the said instrument in writing particularly described and ascertained, was not an invention of certain improvements in the manufacture of woollen and other fabrics, of which wool and fur formed a principal component part, and in the machinery employed for effecting that object.

Upon these several pleas issue was joined.

The cause was tried before ERLE, J., at the sittings in London after the last term. Evidence of infringement by the defendant having been given, the plaintiffs put in William's specification. The material parts of it were as follows :—

"I, the said J. R. Williams, do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, is particularly described and ascertained in and by the following description thereof, reference being had to the drawings hereunto annexed, and to the letters and figures marked thereon ; (that is to say,) my invention of 'Improvements in the manufacture of woollen fabrics, or fabrics of which wools, furs, or hairs are the principal components, as well as for the machinery used therein,' relates, chiefly, to the making of cloth by felting alone, without spinning and weaving, and consists in a new combination of machinery, apparatus, and processes.

"First, for obtaining a long, even, and uniform bat of wool or other materials of any required length, width, or thickness suitable to be made into commercial ends or pieces of cloth, and afterwards for the purpose of producing such fabrics, or ends, or pieces of cloth composed of all the various well-known felting substances, such as wools, furs, and the hairs of animals ; and which I use either separately or mixed together in *555] every possible proportion, and sometimes with a small addition of non-felting fibrous materials, such as cotton, silk, or flax, not exceeding one-third, as best suits the description of fabric required. The fabrics or manufactures, as produced by these processes and machinery herein first combined and described, wholly depend, for their union and strength, upon the great principle or tendency of these animal products, when properly treated, to combine and unite, or, as it is commonly called, to *felt* together ; and this without the usual auxiliaries of spinning and weaving, (as in the old cloth manufacture,) or the use of any adhesive mixtures being at all employed.

"The raising-machine I have hereafter described to be used in the finishing of cloths, is applicable chiefly to cloth made by felting alone. but is also applicable to cloths produced by spinning and weaving.

"I should first observe, that, in the new manufacture of felted cloths, I dispense entirely with the use of any oil or oleaginous matter, which is generally required in the common woollen manufacture for assisting in the spinning of yarns, and prefer that the wool should be well scoured and dried, after which it should be teased or willied, picked, and scribbled, in the usual way. The dry clean wool, as it is thus prepared, is

then to be weighed out into quantities for producing any required thickness and width of goods as now described—remarking that, for fine wools, I prefer, for obtaining the bat, the method represented at figures 1, and figures 6, 7, 8, 9, 10, and 11, and for short coarse wool and hair the method afterwards described under figures 12, 13, 14, and 15.

“Figure 1 represents a common wool-carding engine, which, to produce broad-cloths, should be made from seventy-two to eighty-four inches broad, and A B C D two long revolving aprons of linen cloth (or any other *suitable material) attached thereto, passing over the rollers or drums 1, 2, 3, 4, which have a motion from the doffers of the card, as here represented, or any other convenient part of the engine. These aprons and drums revolve in opposite directions, as represented by the arrows, so that the inner surfaces, *a, b*, of each apron, move in the same direction, with uniform speed, and nearly with the same velocity with the doffer of the card, as regards their surfaces. The wool is taken off from the doffers by the usual comb-crank motion in an attenuated sliver. This sliver is now received between the two revolving aprons at *c, d*, which have a slight flooring *i i* for their support, and passes on between them until it arrives at the further end of the aprons from the card. A direction is then given to the sliver so that it shall pass up and over the upper apron A C, and wind itself upon the apron one sliver over the other, until the bat has become of sufficient thickness, it being, during the operation, supported and sustained in contact with the apron A C, by the apron B D; for which support the latter apron is principally intended. As the apron A C may be of any determinate length and width corresponding with the card, it is evident that any fixed quantity of wool being passed through the engine and received upon the apron, may be made to produce any required thickness of bat, and, consequently, any required weight of goods per yard that may be desirable, after having undergone the succeeding operations. As in many manufacturing premises these two long extending aprons could not be so conveniently used, for want of room, I sometimes extend them backwards and forwards, and even with several aprons, as shown at figures 6, 7, 8, or perpendicularly up and down, where only two are required, as shown at figures 9 and 10.(a)

*“There is another mode of producing a bat, which, perhaps, on some accounts, is preferable for the finer and lighter descriptions of goods. It is still produced from successive folds of the sliver; but in this way there are several slivers taken off from the doffers of different carding-engines, and simultaneously received upon the same aprons, and enter into the composition of one and the same bat. For this purpose, any of the several arrangements of aprons found most convenient for adaptation to certain premises, may be equally applied, it only being necessary to extend the lower aprons of any of these along and under two, three, or more carding-engines, one standing behind or after the other,

(a) *Shaw's suggestion*—compound apron. Vide *infra*, 567, 574, 576.

as shown at figure 11 : the lower apron is here seen extending under the cylinders and doffers of three carding-engines, reaching from A to B. Under each of these carding-engines is a flooring 1, 2, for preventing the dirt and dust of each from falling upon the bat ; but between each carding-engine there is a transverse opening through the flooring, for allowing the slivers to fall upon the apron, which, as in the other cases (with the one sliver) are carried forward to the lower end of the apron frame as before described for winding the bat upon the roller E, and which bat is afterwards treated in a similar way to all or any of those produced in the other machine. It is necessary that these aprons should be prevented from wrinkling, and kept uniformly and carefully extended throughout their whole lengths, whether passed out at length, as in figure 1, or wound in other directions, as shown at figures 6, 7, 8, 9, and 10. I make use of the following means for effecting this object : (a) Upon the two edges of the apron *a a*, figures 6, 7, 8, is sewn cords *b b*, or strips of leather *558] or any other material, and against these cords or strips the longitudinal guides or strips of wood *c c c* are brought in contact by means of the forked arms *d d* and set screws *e e*, thereby preventing the apron from contracting. Figure 17 represents a detached end view, on an enlarged scale, of a portion of the apron with this contrivance applied. Another plan of effecting this object is shown at figure 18 : the apron *a* is here kept distended by means of friction rollers *c c* working against the cords or strips of leather *b*. The same effect may be produced by using rods or laths of wood, whalebone, or other suitable material, put at proper distances across the apron : but I have found the other methods answer much better.

“ The bat acquires its requisite thickness : it is then cut across its width, as represented at *g*, figures 1, 6, 7, 9, and, the end being passed over the roller E, it is wound firmly upon it by contact of the roller with the roller A. When the last end of the severed bat reaches the roller E, it brings with it the sliver which is continuing to proceed from the carding-engine, and which sliver is, as before, passed up over the apron A C, and another bat is thus then commenced. The bringing off a sliver from the carding-engine, and winding it round a roller in folds, is now practised for the purpose of taking the contents of such roller from the scribbler to the carding-machine, for making rolls for spinning ; and such contents may be, and have, I believe, been, felted into sheets of very limited size by hand ; and, occasionally also, one piece of bat may have been joined one to another, and felted together by manual labour.

“ The continuous bat having been obtained, as before described, and received upon the said roller E, it is then taken to another machine, represented at figures 2 and 3, called the hardening-machine, and placed *559] in the situation marked *ff*. A B is the frame-work of this machine : 1, 2, 3, 4, 5, 6, 7, 8, &c., are rollers, of which *there are

(a) *Milner's suggestion*—longitudinal guides. Vide *infra*, 567, 574, 575

two sets, one over the other. These rollers are wrapped round with an elastic cloth, and the lower set are furnished with a travelling apron, as represented at *a b*.

"There are several steam-pipes connected with a boiler producing steam, brought up and inserted between some of the lower rollers, and under the apron represented at *c c c*, which pipes extend from side to side of the apron, and are finely perforated upon their upper sides, for the purpose of allowing steam to escape upwards, for moistening and warming the bat wool.

"As the first stage of the felting process, called hardening, is now commencing, the upper tier of hardening rollers receive an alternating motion end-wise by a cranked shaft *S* running along the side of the machine, figure 3, upon which there are as many cranks or eccentrics having a short throw of about half an inch, and connected with each upper roller by shackle-bars or slide-rods *nn*. The hardening rollers receive also a slow progressive motion from the main shaft *T* on the other side of the machine, by suitable gearing, consequently moving the apron between the rollers in the direction of the arrows. There is likewise inserted between the rollers and under the apron several heaters, *h h h h*. These heaters are of hollow metal, and connected by stop-cocks with the steam-pipes which furnish the perforated pipes, for the purpose of increasing and regulating the heat applied to the bat, and assisting the incipient process of felting.

"As before stated, the roller *E*, with its bat being brought from figure 1, is placed in the position *ff*, figure 2; and, its end being entered between the front rollers of the hardening-machine at *x*, it is gradually passed through them, and, by means of the alternating motion of the upper rollers acting against the resistance offered by the lower ones, (which do not alternate,) and aided *by the moisture and heat, the bat arrives at [560 the other end of the machine in a consolidated firm state, possessing a considerable degree of feltation. Here, at *g*, it is again wound upon a roller, *F*, by friction of contact with the apron *a b*; and when the whole bat intended for a piece of cloth (in commerce called an end) is finished, and wound upon it, it is taken away to receive the next operation. If this travelling apron be merely wetted by a perforated watering-pipe, or by passing into a trough of water under the machine, the heaters *h h h*, acting upon the moisture of the apron so wetted, will render (in some cases) the steam-pipes unnecessary, but the heaters must then be increased in number, so as to give nearly one heater to every pair of rollers."

[The specification then proceeded to describe the apparatus adapted to manufacture coarse short wools or hairs, or mixtures thereof, into useful fabrics; and also a felting-machine with its apparatus.]

"Figures 19, 20, is what may be now denominated an improved felting-machine. *A B* is the frame and supporting parts of the machine, having a double tier of rollers, (now generally made of cast iron,) the upper tiers

resting between the lower ones, so as to double the points of contact. The undulating motion, and the backward and forward motion produced on the bat in the manner hereinafter described, with this new position of the rollers, materially assist the felting process. These rollers are all actuated by bevil gear upon alternate ends of the upper tier of rollers, which turn the lower ones by spur wheels upon the opposite ends, connected with similar gear upon the two shafts extending the whole length of the machine on each side; and these two side shafts are again connected with each other by similar, but stronger, gear upon the cross main shaft C. Each set of upper rollers should be weighed upon the lower ones, for the purpose of accommodating a certain degree of pressure to all the different degrees of thickness, or accumulated thicknesses, of various goods submitted to their action.

"D D is a box or cistern lined with lead for holding a supply of hot water or soap suds, and in which the lower rollers can be more or less immersed, by regulating the quantity thereof. In the felting of fibres together where the fabric being felted is not held together by threads, acids or acidulated waters have always been used, because they assist the process; but I use a solution of soap, or saponaceous matter, in contradistinction, and as preferable, to acids or acidulated waters, which solution is kept in a heated state as after mentioned. There are disadvantages attending the use of acids, which are avoided by the application of a soapy solution in lieu thereof."

"In order to increase the felting action, it is very desirable to allow the felting rollers to act upon the cloth in as many directions as possible. By the reciprocating motion of this machine, we have seen that this action is produced in each direction longitudinally; and, in order to do this in other directions, the cloth is taken from the last machine, and placed in the entering end of another similar felting-machine; but, instead of being entered as before, the piece is first passed between two feeding rollers T, one of which is shown at figure 20, and which are placed at an angle with the feeding apron of somewhere near forty-five degrees. These two rollers have a velocity from three to four times that of the feeding apron, upon which the cloth is thrown in regular folds as it enters, lying at nearly the same angle as the position of the rollers. This now causes the action to take place diagonally across the piece of cloth; and, after having passed through in this direction, it is reversed; and, when again passed, it will be seen that the action is nearly at right angles with the last. In this way it may now be run through the machine several times, and, for some descriptions of cloth, should be for a time milled in the common clothiers' fulling stocks; and after having been milled in such stocks, I have found that the cloth may again with advantage be passed through the said felting-machine, figures 19, 20."

"With respect to the after finishing of many descriptions of these manufactured goods, I will state that they may readily be subjected to all

the different processes of raising, shearing or cropping, boiling, pressing, &c., used by manufacturers on the old system of spinning and weaving; but I would recommend the following described machine for raising the pile or nap for the finer qualities of felted goods.

"In the drawings, figures 22 and 23, B C represents the frame of a new raising-machine. D, E, are two cylinders covered with wire cards or teazles (but I prefer wire cards :) these may be either filletting or sheet cards: the teeth should be fine and long, of iron or hard-drawn brass wire, not very much bent, but set in good firm leather or india-rubber backs. F, G, are two other smaller cylinders, likewise covered with similar card teeth, to the arbor or shaft of one of which the drawing pulley is attached at one end, and by connecting wheels this is made to actuate the other smaller cylinder. These cylinders separately are geared into the two larger raising-cylinders by toothed wheels so arranged that the surfaces of the smaller ones revolve somewhat faster than the larger ones, and are for the purpose of clearing the larger ones from the flock which would otherwise collect, as it now does in the teeth of the present raising-machines, whether of cards or teazles. These two cylinders are placed in slight contact with each other; and, the teeth being set in different directions, as their surfaces pass each other, (like the fly or fancy of a carding-machine,) it will be readily seen *that in neither of [*563 them can the flocks accumulate, and that the smaller has a very useful tendency to sharpen the larger or raising-cylinders.

"The principal feature in this machine, besides the clearing rollers, it will be seen, is, the diagonal position of the raising-cylinders, one acting from one of the lists towards the other, and the other in the opposite direction. This I have found to produce the closest pile or nap, with the soundest and more even bottom, as well as, of course, the best ultimate finish.

"Now, having thus fully described the whole process of making felted cloths by my improved machinery, I wish it to be understood that I do not claim as my present invention any individual parts of the same; but I claim the adaptation of the *double apron or aprons*, or *compound aprons*, and rollers or cylinders, for the production of bats, as *herein described*, from the long sliver, and the different means herein described for keeping these aprons, together with the bats, in a smooth and even condition; and I claim the extended sliver itself, as *herein described*, applied to forming a bat by successive folios or layers for the production of long or commercial ends of cloth without spinning or weaving.

"I also claim the improvement of the hardening-machine, figures 2, 3, 12, 13, 14, 15, by using the heaters in addition to steam-pipes or pans, or in conjunction with a wetted apron as hereinbefore mentioned, and using travelling aprons as hereinbefore described.

"Also I claim the improved position of the rollers in the felting-machine, figures 19 and 20, for producing the double contact of each tier of

rollers, and the combined reciprocating and progressive motion of these rollers, as well as the manner in which this motion is produced, as applied to the said felting-machine; and also the method of diagonal, or *564] cross, felting, as effected by the *feeding rollers figure 20, hereinbefore described; and also the method described at figure 21 of producing long continuous fabrics of felt in a fit state for the common fulling stocks.

"I also claim in the raising-machine, figures 22 and 23, the diagonal position of the raising-cylinders as hereinbefore described, and particularly also the use of other or opposite revolving cylinders, whether covered with cards or any other material for clearing the raising-cylinders whilst at work, as applied to the cloth manufactured by felting alone, or by the old method of spinning and weaving.

"I also claim *the use of soap* or saponaceous matter dissolved in water, *in conjunction with rollers*, for assisting in the felting of fabrics made without spinning and weaving, in contradistinction to acids or acidulated waters, which have heretofore been used for fabrics depending for their union upon felting alone."

The defendant had adopted a process similar to that described in the above specification for passing the bat through the hardening-machine, and had merely substituted a drum for the revolving apron, which the plaintiff's witnesses stated to be substantially the same thing.

On the part of the defendant, evidence was given to show that the taking the sliver directly from the scribbling-machine, to form the bat, (as described in Williams's specification, ante, p. 556,) in place of the exhausting cylinders formerly used, was the invention of one Shaw while in the employ of a company of which Williams was a member; and that Shaw was also the inventor of the compound apron described in the specification at p. 556, the object being to form a greater length of bat in a small space; and that both were communicated to Williams before the date of his patent. It did not appear that Shaw was a person employed

*565] for the *purpose of making improvements. It was proved also that longitudinal guides (somewhat similar to those described in the specification at p. 557) were suggested by one Milner, another workman in the establishment, in the presence of Williams.

The use of soap and water in combination with the rollers (as described in the specification at p. 560) was proved to be new, though each had been used separately, for many years.

With respect to the diagonal felting process, described at p. 561, it was contended on the part of the defendant, upon the evidence of professor Farey, that it was substantially the same in principle as that for which a previous patent had been granted to one Robertson on the 4th of April, 1838, for "certain improvements in the manufacture of hosiery, shawls, carpets, rugs, blankets, and other fabrics." The material parts of this specification were as follow:—"Another of the said improvement

consists in manufacturing shawls, carpets, rugs, blankets, and long continuous fabrics or cloths, suitable for various useful purposes, of or with the said furs before named, or any of them, either alone or mixed with wool, or with silk, or with cotton, or with dressed flax, or with hemp, or with tow, and by means of causing the materials used to intertwist, interlock, and mat together, and form a close firm texture, without the aid or addition of any adhesive mixture, and without the operation of weaving being at all required." The specification, after describing the process of felting with the exhaust cylinder, proceeded thus:—"The steam is then allowed to enter the pipes, and the rollers R are made to traverse across the semi-cylinders, and, after passing many times across them, so as thoroughly to roll the bat horizontally, the rollers should be lifted up, by means of straps attached to their ends, and by suitable machinery placed above the same; and the position *of the rollers should be then shifted, so as to make them travel angularly, [566 first, several times in one direction, and afterwards, by being again properly shifted, from angle to angle, in the opposite direction. During all the time that the upper rollers are travelling, whether horizontally or angularly, the plate with semi-cylinders should be made to move backwards and forwards, in the direction, and with the alternating motion, before described."

Evidence was also given of the mode of working a raising-machine invented by one Walton, with a view to an objection that the claim in the plaintiff's specification was, in this respect, too large and unlimited. It appeared, that, in Walton's machine, the raising-cylinders were placed in a parallel direction, which was found not to answer: the use of the clearing-rollers appeared from the plaintiff's evidence to be new.

It was insisted, on the part of the defendant, that the claim in Williams's specification to the exclusive use of the diagonal raising-machine, without reference to the position of the cylinders upon the cloth, was larger than was justified by the evidence; and that the use of soap and water as a substitute for acidulated water, was, in like manner, too general and unlimited.

The learned judge, in summing up the case to the jury, gave a short history of the manufacture of cloth by felting prior to the date of Williams's patent, upon what was called the exhaust principle, and pointed out the defects that were found in that process. That process was as follows:—As the sliver left the carding-engine, it was taken up by two rollers furnished with teeth, whereby the fibres were separated and thrown upon a perforated cylinder in which a vacuum was created, which caused the fibres to accumulate on the surface of the cylinder, where it formed a bat. The bat, so formed, was then passed on to a *hardening- [567 machine consisting of two sets of rollers *without any travelling apron*: it then went to another machine similarly furnished with rollers, the lower row of which were placed in a vessel containing acidulated

water. The bat was then ready for felting. The main defect in this process was, that the bat, so formed, was uneven, and of insufficient length for commercial purposes. The principal feature of Williams's alleged invention was the substitution of a compound travelling apron for the perforated cylinder, by means of which the sliver was taken directly from the carding-engine for the purpose of forming a bat. With respect to the improvements alleged to have been introduced by Shaw, (*suprà*, p. 556,) the learned judge observed: "I take the law to be, that, if a person has discovered an improved principle, and employs engineers, or agents, or other persons, to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be imbodyed in his patent; and, if so imbodyed, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle. The improvement claimed by Shaw (*suprà*, p. 556) is, that, after the bat has been formed upon a revolving apron by successive folds or layers of sliver, three or more revolving aprons should be placed one above another, and connected with each other. That is but a more convenient mode of carrying out the principle of the patentee." And, as to the improvement suggested by Milner (*suprà*, p. 557)—the introduction of the longitudinal *568] guides for the purpose of keeping *the travelling apron evenly extended—he also told the jury that it was one of those subordinate improvements helping to carry out the general principle, which the patentee had a right to adopt. His lordship then proceeded to comment on Williams's specification, which, he said, related chiefly to the making of cloth by felting alone, without spinning and weaving, and consisted in a new combination of machinery and apparatus and processes. As to the substitution of soap and water for acidulated water, he observed that the specification did not make an absolute claim of the use of soap and water when cloth is put under rollers in the course of felting; but that, when cloth is made by felting only, where acidulated water was used before, the patentee advised the substitution of soap and water, in combination with the rollers. As to the diagonal felting, he told them that the mode described in Williams's specification was substantially different from that described in Robertson's specification, and that Williams's claim was only for the means by which the object was attained. With regard to the raising-machine, he observed that the patentee's *claim* was expressly limited to the diagonal position of the raising-cylinder as described in the earlier part of the specification, (p. 563,) and the use of the clearing-rollers; and he left it to them to say whether or not that was substantially a new invention. And the learned judge concluded by telling the jury that the nature of Williams's claim was, the extended sliver, the

revolving apron, and the use of travelling aprons for forming the sliver into a bat, (the bat being protected in its passage through the felting process by the travelling apron,) and hardening it into felted cloth: and he left it to them to say whether the substitution, by the defendant, of the drum for the revolving apron, was a colourable difference only, and a substantial infringement of Williams's patent; and also whether the defendant had *adopted Williams's mode of sending the bat through the hardening-machine; and, generally, to say whether the invention was new,—whether Williams was the first inventor,—and whether the defendant had been guilty of an infringement of the patent, in both, or either, of the respects above mentioned. [*569]

The jury returned a verdict for the plaintiffs on all the issues, damages 40s.

Channell, Serjt., (with whom was *Webster*,) on a former day in the term, moved for a new trial, on the ground of misdirection. The patentee has, by his specification, claimed the raising-machine with the diagonal position of the raising-cylinders, in terms too large, and without reference to the position of the cylinder on the cloth. [*CRESSWELL, J.* The claim is, for the diagonal position of the raising-cylinders, *as before described*, and particularly the use of the opposite revolving cylinders for clearing the raising cylinders whilst at work.] The claim is also too large, in respect of “the extended sliver, applied to forming a bat by successive folds or layers, for the production of long or commercial ends of cloth, without spinning or weaving;” it should have been limited to some particular mode. Upon this point the attention of the jury was not sufficiently called to the process of felting already in use. The taking the sliver directly from the carding or scribbling-machine to the hardening-machine, for the purpose of forming the bat, appeared, upon the evidence, to have been invented by Shaw, and not by Williams. [*ERLE, J.* I think Shaw only claimed the compound apron, and not the carrying the sliver directly from the carding-machine to the apron. At all events, no such point was made at the trial.] The use of soap and water clearly was not new, and rollers also were in use before; and, therefore, in this respect, the specification was bad. [*ERLE, J.* The *evidence was that the application of soap and water in lieu of acidulated water in the felting process, was new when combined with the double set of rollers.] [*570] As to the diagonal or cross-felting, the attention of the jury was not, as it should have been, invited to Robertson's specification. And, with regard to the compound apron invented by Shaw, and the longitudinal guides suggested by Milner, there was no evidence to show that these persons were employed by Williams for the purpose of making improvements in the machinery. The distinction was established in *Bloxam v. Elsee*, 1 Carr. & P. 558, where it was held by Lord TENTERDEN, that, if a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master;

though, if the master employs a skilful person *for the express purpose* of inventing, the inventions made by him will belong to the master so as to enable him to obtain a patent for them. [CRESSWELL, J. That was the case as to Whitehouse's patent, 1 Webster's P. C. 473. There, an individual was employed for the express purpose of suggesting improvements and trying experiments of all kinds. The master so admitted before the privy council, when he applied for an extension of the patent: and the privy council, before they granted the extension, compelled the master to give his servant a large remuneration.] In that case the patent was taken out in the name of the actual inventor, and not in that of the master.

Cur. adv. vult.

COLTMAN, J., delivered the opinion of the court.

In this case a motion was made by my brother Channell for a new trial on the ground of misdirection.

It was argued that the patentee had claimed as his invention a raising-machine with the diagonal position of *the raising-cylinders, in
*571] terms too unlimited; but on looking at the terms of the specification, it appears to us that his claim is expressly limited to his own mode of placing them.

It was further urged, that the patentee had claimed the extended sliver applied to forming a bat by successive folds for the production of long or commercial ends of cloth, without limiting it to any particular mode of applying it; but, we think, that, on the fair construction of the terms of the specification, the claim must be considered as limited to the use of the extended sliver for making a bat, in the mode described in the specification.

It was further urged, that a part of the process described in the specification, namely, the taking the sliver directly from the scribbling-machine to form the bat, was the invention of a workman named Shaw: but it appeared that no such point was made at the trial, and we think the defendant is not now at liberty to raise any objection on that score.

An objection relating to the claim of the use of soap in conjunction with rollers, was disposed of at the time when the motion was made. On these points, therefore, there will be no rule.

It was also objected that it should have been left to the jury to say whether the present patent and Robertson's patent were the same as to the method of diagonal or cross-felting. On looking at the judge's notes, it appears that there was no evidence given to show that the two were the same; and, standing as the question did nakedly on the two specifications, the construction of them, according to the authority of *Neilson v. Harford*, 8 M. & W. 806, 1 Webster's P. C. 331, was for the judge, and not for the jury. We think, therefore, there is no ground for a rule on this point.

*572] It was further objected that the patentee had claimed *as a part of his invention the compound apron which was alleged to

the invention of Shaw, and the longitudinal guides invented by Milner. And, on the question whether the patentee had a right to claim these as a part of his invention, we think that a rule should be granted.

Cause was shown against this rule in Trinity term, by

Sir T. Wilde and Shee, Serjts., (with whom was Butt.) Assuming that the packing or placing the compound apron in layers one above the other was, in reality, first suggested by Shaw, that was a mere variation in the mode of working out Williams's invention, and no alteration in its principle, and Williams had clearly a right to adopt the suggestion, and to embody it in his specification, which must of necessity contain all the latest improvements that had come to his knowledge. Milner's suggestion of the longitudinal guides stands upon precisely the same foundation. [MAULE, J. Placing the machinery in any particular position was no part of the invention claimed by Williams: but the thing recommended by Milner did help to effect one thing that Williams desired to do, viz., to keep the compound apron evenly distended.] The doctrine upon this subject is accurately stated by ALDERSON, B., in *Minter v. Wells*, 1 Webster's P. C. 132: "If Sutton suggested the principle to Minter, then he would be the inventor; if, on the other hand, Minter suggested the principle to Sutton, and Sutton was *assisting* him, then Minter would be the first and true inventor, and Sutton would be a machine, so to speak, which Minter uses for the purpose of enabling him to carry his original conception into effect." That is precisely applicable to Shaw and to Milner in the *present case; both were aiding in the manufacture of the machine. [*573]

Channell and Byles, Serjts., in support of the rule. The objections now under consideration were not properly submitted to the jury. It may be that the suggestions of Shaw and Milner did not affect the principle of Williams's invention: but the question is, whether they are not material improvements, which the patentee has unduly claimed: and that question, as well as whether Shaw and Milner were the ordinary servants or workmen of the party making the machine, or whether they were persons expressly employed for the purpose of suggesting improvements, should have been distinctly submitted to the jury. In *Barker v. Shaw*, 1 Webster's P. C. 126, n., in an action for an infringement of a patent for an improvement in making hats, one of the plaintiffs' witnesses stating that he had made the improvement, which was the subject of the patent, whilst employed in their workshop, HOLROYD, J., nonsuited the plaintiffs. [MAULE, J. It would be very dangerous to employ any workman in matters of this sort, if the inventor were precluded from adopting any slight and subordinate improvement suggested by him. This seems to me to be very like the case of *Bloxam v. Elsee*.] The important distinction between a suggestion made by a party employed for the purpose of assisting in the perfecting of the invention, and an improvement invented by a mere ordinary servant or workman, was not properly pointed out to

the jury. It was most material to ascertain the exact nature of Shaw's employment. [MAULE, J. That does not seem to have been matter of controversy at the trial. The judge was not bound to leave it to the jury, unless requested by the defendant's counsel.]

*574] *TINDAL, C. J. I must confess I do not feel pressed by the difficulty that has been urged on the part of the defendant as to the last point having been kept from the jury. The defendant had the remedy at hand: for, if the judge had erroneously assumed that the matter was not in dispute, he should have been requested to take the opinion of the jury upon it. The real question is, whether or not the improvements suggested by Shaw and by Milner were of such a serious and important character as to preclude their adoption by Williams as parts of his invention. The rule was granted simply upon the objection that the patentee had claimed as a part of his invention, the compound apron which was alleged to be the invention of Shaw, and the longitudinal guides invented by Milner. And the question is, whether, having so claimed these two things, they form any important parts of the invention for which the patent has been obtained. The main object and design of the patentee were the obtaining a long, even, and uniform bat, suitable to be made into commercial ends or pieces of cloth. The patentee, in his specification, after describing the double or compound revolving apron, thus refers to that which is called Shaw's suggestion:—
 “As in many manufacturing premises, these two long extended aprons could not be so conveniently used, for want of room, I sometimes extend them backwards and forwards, and even with several aprons, as shown (in the drawings) at figures 6, 7, and 8, or perpendicularly up and down, where only two are required, as shown at figures 9 and 10.”
 This is, obviously, a mere matter of convenience suggested to and adopted by the inventor. It would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them taken out by his employer. Each *case
 *575] must depend upon its own merits. But, when we see that the principle and object of the invention are complete without it, I think it is too much that a suggestion of a workman, employed in the course of the experiments, of something calculated more easily to carry into effect the conceptions of the inventor, should render the whole patent void. It seems to me that this was a matter much too trivial and too far removed from interference with the principle of the invention, to produce the effect which has been contended for. If that be so with respect to the suggestion made by Shaw, much more is it so as to that made by Milner, which does not appear to have been altogether adopted. For these reasons, I am of opinion, that the rule should be discharged.

MAULE, J. I also think the rule which has been granted in this case should be discharged. Two portions of the invention described in and

claimed by Williams's specification, are said not to have been his invention, viz., the suggestions made by Shaw and by Milner. With respect to the suggestion of the latter, it certainly tended to something essential to the carrying out of the main object which the patentee had in view, viz., the transverse distension of the compound apron. The inventor having intended to produce the same effect by other means, the suggestion of Milner to substitute longitudinal guides for the pulley guides, was a mere variation in the mode, which might well be adopted without vitiating the patent. But the evidence does not raise the question; for, that which Williams adopted was not Milner's recommendation; he having used a guide with a square shoulder, instead of a grooved or rounded one, as suggested by Milner, and having substituted a selvage of leather for one of cord. As to Shaw's suggestion, that was of a matter much less essential than that of Milner: it was a mere mode of arranging the compound apron, *which would be very convenient [*576 in some premises. At the trial, the learned judge told the jury that, in his opinion, both these suggestions were mere subordinate improvements, accessory to the main principle of the invention, and tending to carry it out more conveniently, and therefore such as the patentee had a right to adopt and to embody in his specification; and he left it to the jury to say whether or not Williams was the inventor of that which he claimed. A judge, undoubtedly, has no right to state his own assumptions of fact to the jury, as matters of law: but he has a right to give his opinion, and it is his duty to do so; and, unless the jury are misled by what he says, there is no reason for granting a new trial. I think that, if the jury in this case had come to a different conclusion, they would have done wrong. As well might the man who first suggested the sliding tubes, assert himself to have been the inventor of an essential part of the telescope. This case may be rightly determined without the assistance of the doctrine of *Bloxam v. Elsee*, to which it is by no means opposed.

CRESSWELL, J. I agree with my lord and my brother MAULE, that this rule should be discharged. The improvement claimed by Shaw was something clearly and palpably subordinate to the invention of the patentee. The object was to obtain a bat of an even and sufficient thickness, and of sufficient length, to be felted into cloth fit for commercial purposes. The patentee had obtained a bat sufficiently even and of sufficient substance, and he ascertained that, by extending the compound apron, he could obtain the required length. The suggestion of Shaw was of a mere mode of using the extended apron in a more compact and convenient form. I quite accede to the doctrine laid down in *Bloxam v. Elsee*, which was adopted by my brother ERLE at the trial. He took it for granted that this was something *subordinate to the principal invention: and it was not suggested, on the part of the defendant, that the evidence did not bear that out: indeed, there was no

[*577

ground for making any such suggestion. The same observations will apply to the longitudinal guides, the adoption of which appears to have been recommended by Milner. If the verdict had been the other way, it would, in my opinion, have been quite wrong.

ERLE, J. I am of the same opinion. In speaking of the suggestions of Shaw and of Milner, I used the same form of expression, telling the jury, that, in my opinion, the improvements suggested by each of those parties were such subordinate matters as the patentee was at liberty to embody in his specification; leaving it to the jury to form their own conclusion from the evidence which they had heard. This was not laying down any principle of law; but merely making a very direct statement of opinion upon the facts.

Rule discharged.

*578]

*BURGESS v. GRAY. May 5.

B., the owner and occupier of premises adjoining the highway, employed C. to make a drain therefrom, to communicate with the common-sewer. In the performance of this work, the workmen employed by C. placed gravel on the highway; in consequence of which A., in driving along the road, sustained personal injury. Before the accident the dangerous position of the heap was pointed out to B., who promised to remove it. C. had the sole management of the work, and employed and paid D. to cart away part of the rubbish, at a certain price per load, and had charged A. in his bill with the sum so paid —
Held, that B. was liable to A., in case.

CASE. The declaration stated that the defendant, before and at the time of committing the grievance thereafter mentioned, was *possessed* (a) of certain houses, &c., situate and being near to and adjoining a certain street and highway in the county of Middlesex; which street and highway, at the time of the committing of the said grievance, was, and from thence had been, and still was, a common public street and highway for all persons to go, return, pass, and repass on foot, and by and with horses and carriages, at all times of the year, at their free will and pleasure: yet the defendant, well knowing the premises, whilst he was so possessed of the said houses, &c., on, &c., aforesaid, wrongfully and unjustly put and placed, and caused to be put and placed, in a large heap, divers large quantities of earth, gravel, materials, dirt, and rubbish in and upon the said highway, and near to the said houses, &c., and wrongfully and injuriously kept and continued the same therein and thereon in such heap and mound, until the happening of the injury thereafter mentioned, and thereby and therewith greatly obstructed the said highway; by means of which premises, afterwards, to wit, on, &c., aforesaid, a certain carriage, to wit, a chaise-cart, of the plaintiff, of great value, to wit, of the value of 150*l.*, with a horse then drawing the same, in which the plaintiff was
 *579] then lawfully riding and driving in and along the *said highway, was driven upon and against the said heap, and the plaintiff was

(a) This allegation is not traversed.

then violently thrown from and out of his said carriage to and upon the ground there; that the said horse was, by means of the premises, then greatly scared and frightened, and thereby then ran away with, and overturned, the said carriage of the plaintiff, and the same was thereby then broken to pieces, damaged, and destroyed; and that by means of such several premises one of the legs of the plaintiff was fractured, and he became and was greatly hurt, bruised, and wounded, &c., and so continued for a long time, to wit, from thence hitherto, during all which time the plaintiff thereby suffered and underwent great pain, and was prevented from attending to, or working at his trade of a paper-stainer, and from performing and transacting his other lawful and necessary affairs and business by him to be performed and transacted, and thereby lost great gains which he might, and otherwise would, have acquired; that the plaintiff, by means of the premises, became and was and still is greatly and permanently injured in his health, and lamed, and also, by means of the premises, the plaintiff was obliged to, and did necessarily, expend divers moneys and incur divers debts, in the whole amounting to a large sum, to wit, 100*l.*, in and about endeavouring to be cured of the said wounds, &c., so occasioned as aforesaid, and in and about repairing the damage done to his said carriage as aforesaid; and that the said carriage became and was, by means of the premises, for a long time, to wit, from thence hitherto, of no use or value to the plaintiff, and was and is, by means of the premises, greatly depreciated in value.

The defendant pleaded not guilty.^(a)

The cause was tried before TINDAL, C. J., at the *sittings at Westminster after Michaelmas term last. The facts that appeared [*580] in evidence were as follow:—The defendant was a proprietor of newly erected houses in the Cambridge Heath road, near to the Mile End turnpike; which, however, had been built for him by one Palmer, and were in the occupation of his tenants. In forming a drain from some premises (also belonging to the defendant) at the back of the new houses to the common-sewer under the road, Palmer, by his servants, caused a quantity of earth and gravel to be deposited on the left-hand side of the road leading to London. The drain being finished, Palmer employed a person to carry away the earth and rubbish; but the party so employed left a portion of it on the highway; and the plaintiff and a friend, on their way to London, on the evening of Sunday, the 28th of July last, in a chaise-cart belonging to the former, ran upon the heap so left on the road, and the plaintiff was thrown from the cart, and sustained the injury complained of in the declaration.

The only evidence tending to show that the defendant had personally interfered in the matter,—besides the fact of his having applied to the commissioners for leave to break into the sewer,—was that of Barker, a

^(a) By this plea as well the defendant's possession of the houses, as all other matters of inducement, were admitted.

policeman, who was called as a witness on the part of the plaintiff, and who stated, that, upon observing the heap left on the road side opposite the defendant's premises, he called the defendant's attention to it, and told him it must be taken away; whereupon the defendant said he would remove it as soon as he could; and that, after the accident had happened, he told the defendant that it was occasioned by the rubbish left upon the road, upon which the defendant said he had several witnesses to prove that it occurred through the plaintiff's own carelessness.

On the part of the defendant it was shown that the heap had been *581] considerably increased by oyster-shells, &c., deposited thereon by strangers. And Palmer, the builder, stated that he had the entire control and sole management of the work; that he employed and paid the person who carted away about three loads of the rubbish, at a certain price per load; and that the sum so paid had been charged by him to the defendant. Several witnesses were called for the purpose of showing that the plaintiff was, at the time of the accident, driving in a reckless manner, and that there was sufficient light at the spot, and ample room to enable the plaintiff to avoid the obstruction provided he had exercised ordinary care: and it was contended, on the authority of *Butterfield v. Forrester*, 11 East, 60,(a) that the plaintiff was so far contributory to the

(a) As to this case, vide 1 Mann. & Gr. 571—574.

"If a man puts logs of wood, *sparsim* in a highway, and suffers them to continue there for two months, or other such long time, though a man may, with great care, and in the day, pass safely, yet if I ride in the way, not perceiving the logs, and my horse stumbles upon the logs, whereby he falls and throws me, by which means I receive any damage, (*scilicet*, several wounds, as the case was,) I may have an action upon the case against him for this special damage received, though this laying of logs in the way be a common nuisance." Hill, 15 Jac. B. R. adjudged between ——— and ———. 1 Roll. Abr. 88, translated, 1 Vin. Abr. 554, *Nuisance*, (N. b 2,) pl. 2.

"If A., seised of a waste adjacent to a highway, digs a pit in the waste within thirty-six feet of the way, and the mare of B. escapes into the waste, and falls into the pit, and there dies, yet B. shall not have any action against A.; because the making of the pit in the waste, and not in the highway, was not any wrong to B., but it was the default of B. himself that his mare escaped into the waste." Pasch. 5 Jac. B. R. between Blith and Topham, adjudged; 1 Roll. Abr. 88, translated 1 Vin. Abr. 555, *Nuisance*, (N. b 2,) pl. 4. According to the report of the same case in Cro. Jac. 158, pl. 11, "it was adjudged upon the declaration, and not upon the verdict, that the bill should abate; for, when the mare was straying, and he shows not any right why his mare should be in the said common, it was no wrong to him, and, though his mare fell in, he has no remedy, and so it is *damnum absque injuria*." S. P. arg. *Mitchell v. Alcester*, 1 Vent. 295.

And see *Knapp v. Salisbury*, 2 Camp. 500; *Smith v. Dobson*, 3 Mann. & Gr. 59; *Aldridge v. Great Western Railway Company*, ib. 515; *Webb v. Page*, 6 Mann. & Gr. 196; *Millen v. Hawery*, Latch, 13, Com. Dig. tit. *Pleader*, (3 M. 31.)

In *Butterfield v. Forrester*, the court of King's Bench held, that one who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and without using ordinary care, by the exercise of which he might have seen and avoided the obstruction. The principle upon which the decision proceeded seems to be that want of care in respect of the probability of injury to others from riding fast through a public street, is tantamount to want of care in avoiding that which might be injurious to the party himself. If the plaintiff had been riding over his own field, remote from any footpath, at the rate of twenty miles an hour, it would probably not have been contended that he was chargeable with want of care; and if his horse had been killed by falling into a pit wrongfully dug in that field by a stranger, it would hardly have been doubted that such stranger would be responsible for the injury. But, according to the dicta in *Butterfield v. Forrester*, there would appear to be no remedy against a person who had dug a pit in a highway, if it

injury of which he complained, as to disentitle him to maintain an action for compensation. It was further submitted that the defendant was not liable for the negligence of Palmer, he not being the servant of the *defendant in a sense that would render the latter responsible, in [*582 aw, for Palmer's acts.

His lordship summed up the evidence to the jury, and told them, that, if they thought the defendant had completely parted with all control over the work to Palmer, he could not be held responsible for the injury *done to the plaintiff by Palmer's negligence: but, that, if he had [*583 himself exercised any control, he was liable.

To this direction the counsel for the defendant excepted on two grounds—first, that there was no evidence of any order or direction by the defendant for placing the rubbish on the road—secondly, that, inasmuch as Palmer, the person employed to make the drain, did not stand in the relation of a servant to the defendant, the latter was not responsible for his acts. The exceptions, however, were afterwards abandoned, (a) and leave was reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that either objection was well founded.

The jury returned a verdict for the plaintiff, damages 45l.

Byles, Serjt., in Hilary term last, pursuant to the leave reserved to him, obtained a rule nisi to enter a nonsuit, on the grounds urged at the trial. He referred to *Bush v. Steinman*, 1 Bos. & Pul. 404; (b) *Sky v. Edgley*, 6 Esp. N. P. C. 6; *Littledale v. Lord Lonsdale*, 2 H. Blac. 299; *Laugher v. Pointer*, 5 B. & C. 549, 8 D. & R. 556; *Quarman v. Burnett*, 6 M. & W. 499; *Randleson v. Murray*, 8 Ad. & E. 109, 3 N. & P. 239; *Rapson v. Cubitt*, 9 M. & W. 710; and *Milligan v. Wedge*, 12 Ad. & E. 737, 4 P. & D. 714, and contended that the doctrine laid down in the three *first-mentioned cases had been materially narrowed by the rule [*584 suggested by LITTEDALE, J., in *Laugher v. Pointer*, and which was adopted by the Court of Exchequer in *Quarman v. Burnett*.

Talfourd, Serjt., (with whom were *Peacock* and *Bramwell*,) now showed cause. This case may be disposed of without considering whether the

party injured was riding at a pace, which, in respect of some collateral matter, was improper, or if his servant came in contact with an obstruction, in consequence of trotting a horse, which he had been directed to walk, or of riding through street A. when his orders had been to go through street B.

The rule is more cautiously laid down by Bayley, B., in *Vennall v. Garner*, 3 Tyrwh. 35, 1 Cr. & M. 21, that the plaintiff could not recover, if his ship were in any degree in fault, in not endeavouring to prevent the collision. And see *Aston v. Heaven*, 2 Esp. N. P. C. 538; *Cruden v. Fenham*, ib. 686; *Clay v. Wood*, 5 Esp. N. P. C. 44; *Vanderplank v. Miller*, Mood. & Mal. 169; *Bridge v. Grand Junction Railway Company*, 3 M. & W. 244, 6 Dowl. P. C. 340; *Flower v. Adam*, 2 Taunt. 314.

(a) *Quare*, whether the exception would not have been stronger if taken for the plaintiff—that the defendant could not relieve himself from responsibility, on account of the acts of a builder employed and set in motion by him upon his own premises, by abstaining from exercising any control over the acts of that builder, it being admitted on the record that the defendant was possessed of the house upon which Palmer was employed by him. Vide *supra*, 578 (a).

(b) And see *Martin v. Tamperley*, 4 Q. B. 398.

decision in *Bush v. Steinman* is now law or not. It has never yet been held, that, where the proprietor of fixed property employs persons to do work upon it, and they, in the course of the performance of that work, commit a nuisance on the highway which occasions a personal injury to a third person, the employer is not responsible for the consequences. On the contrary, in the cases of *Bush v. Steinman*, *Sly v. Edgley*, and *Randleson v. Murray*, the occupiers of land or buildings were held responsible for acts of others than their servants, done upon, (a) or near, or in respect of, their property. In *Randleson v. Murray*, the defendants, who were occupiers of a bonded warehouse, engaged a master-porter to lower and convey a barrel of flour from their warehouse: the master-porter engaged a master-carter: and both of them attended with their men. During the process of lowering it from the warehouse, the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master-porter: and the defendants were held to be liable. Lord DENMAN there observed: "It makes no difference whether the defendants employed people of their own to move their goods, of procured others who were likely to move them more expertly, and left it to their superintendence." The language of LITTLEDALE, J., in *Laugher v. Pointer*, 5 B. & C. 552, 564, *is not inconsistent with that decision. After referring to several cases showing how far the responsibility of a man for acts of negligence committed by servants or workmen employed by him extends, that learned judge observes: "There are, however, cases which have been determined upon principles not altogether consonant to what I have before considered are those upon which the liabilities of parties should be determined, where persons have been held liable for the negligence of individuals who were not their own immediate servants, but the servants of agents whom they had employed to do their work. In *Bush v. Steinman*, the owner of a house had employed a surveyor to do some work upon it: there were several sub-contracts, and one of the workmen of the person last employed, put some lime on the road, in consequence of which the carriage of the plaintiff was overturned; and it was held that the owner of the house was liable, though the person who occasioned the injury was not his own immediate servant. So, in *Sly v. Edgley*, a person had employed a bricklayer to make a sewer, who left it open; in consequence of which the plaintiff fell in and broke his leg. The person who employed the bricklayer was, upon the principle of *respondent superior*, held answerable for what the bricklayer had done. These cases appear to show, that, in these particular instances, the owner of the property was held to be liable, although the injury had been occasioned by the negligence of contractors or their servants, and not by the immediate servants of the owner." "But," continues the learned judge, "supposing these cases to be rightly decided, there is this material distinction, that there the injury was done

(a) *Vide infra*, 586, n.

upon, or near, and in respect of, the property of the defendants, of which they were in possession at the time. And the rule of law may be, that, in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured,^(a) and that, whether his property is managed by his own immediate servants, or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." *Quarman v. Burnett* determined the question that was left undecided by the case of *Laugher v. Pointer*. In *Quarman v. Burnett*, the owners of a carriage were in the habit of hiring horses from the same person, to draw it for a day or a drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party; and it was held that the owners of the carriage were not liable to be sued for such injury: and that it made no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; and that they had always paid him a fixed sum for each drive; and that they had provided him with a livery, which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house. PARKE, B., in delivering the judgment of the court in that case, in affirmance of the view taken by Lord TENNERDEN, and LITLEDAL, J., in *Laugher v. Pointer*, excepts the case now under consideration. He says, "The rule of law may be, that, where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured;

(a) In *Beautieu v. Finglam*, P. 2 H. 4, fo. 18, pl. 6,—in case for so negligently keeping his fire that the plaintiff's houses, and his goods therein, were burnt,—Markham (Justice of C. P.) says, "I shall answer to my neighbour for him who enters my house with my leave or with my knowledge, or who is a guest with me, or for my servant, if he or any of them does any thing, as with a candle or other thing, by which doing the house of my neighbour is burnt. But if a man out of my house, against my will, puts fire into the straw of my house or elsewhere, whereby my house is burnt, and the houses of my neighbours are burnt, of that I shall not be bound to answer to them, &c., for that cannot be said to be by malfeasance (male) on my part, but against my will."

The report then proceeds thus:—"Horneby (King's Serjt.). This defendant is undone and impoverished for ever if this action be maintained against him; for then twenty other such suits will be brought against him upon the like matter.

"Thirning (Chief Justice of C. P.). What is that to us! It is better that he should be quite undone than that the law should be changed for him. And afterwards they were at issue—that the house was not burnt by means of the defendant's fire."

Lord Brooke remarks, that no objection was taken to this issue on the ground of negative pregnancy, Bro. Abr. tit. *Negative Pregnant*, pl. 8.

In H. 33 H. 6, fo. 1, pl. 3, (which was debt against the marshal of B. R. for the escape of persons set free by Jack Cade,) Choke (Serjt., afterwards C. J. of C. P.) says, "If a stranger comes into my house, and by his folly sets it on fire, so that other houses of my neighbours are burnt, I shall not be charged with the burning of my neighbours' houses." Which was not contradicted.

and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances: but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to movable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods, for any persons who choose to intrust them with them." Here, the defendant was the owner of property adjoining the highway, in the occupation of his
 *588] tenants; (a) *the work which gave rise to the nuisance was done in respect of that property; the earth that was excavated belonged to the defendant; he was charged at a certain rate per load for the removal of that portion of it which was removed; if any person had carried it away without his consent, he might have maintained trespass or trover in respect of it. Can it be said, that, because he did not, with his own hands, place it upon the highway, he is not responsible for the consequences, seeing that the act was done with his knowledge and for his benefit? Besides, there was ample evidence that it was kept and continued there with his assent.

Byles, Serjt., in support of his rule. There was no evidence of any personal interference by the defendant, or of any direction given by him, for placing the rubbish on the road, or, it having been so placed, for leaving it there: and, if there had been any such evidence, the case ought to have been differently submitted to the jury. It was proved that the placing of it there was the act of Palmer or his servants; and no mere non-feasance on the defendant's part would render him liable for their acts. The circumstance of his having promised to remove it, when spoken to upon the subject by the policeman, was no evidence that he placed it where it was, or that it was so placed under circumstances which rendered him liable to remove it. [TINDAL, C. J. It was some evidence of adoption of the act of his agent.] The only question is, whether the relation between the defendant and Palmer was such as to render the former liable for the acts of the latter. If a man be in all cases liable for the acts of his sub-agents, he may incur serious responsibility without having any remedy over. *Bush v. Steinman*, so far as it is applicable to this case, is not law at the present day. The doctrine of *Quarman v. Burnett*
 *589] clearly exonerates this defendant. *Randleson v. Murray* *and *Milligan v. Wedge* were cases of negligent use of the party's own property. In *Winterbottom v. Wright*, 10 M. & W. 109, A. contracted with the postmaster-general to provide a mail-coach to convey the mail-bags along a certain line of road; and B. and others also contracted to horse the coach along the same line: B. and his co-contractors hired C. to drive the coach: and it was held that C. could not maintain an action

(a) *A fortiori*, if in his own possession, *supra*, 579, n.

against A., for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. That case shows that the defendant here could have had no remedy over against Palmer, or against a sub-contractor employed by him, for want of privity. [CRESSWELL, J. That case has very little application here. The argument on the part of the plaintiff is, that the defendant is responsible for his own act, not for the negligence of Palmer.] The rule is well laid down in the judgment in *Quarman v. Burnett*: "Upon the principle that *qui facit per alium, facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer—he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or immediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act, the act of another: consequently, a third person *entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and, to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable, not only for the acts of his own servant, but for any injury which arises by the act of another person in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position." [CRESSWELL, J., referred to *McLaughlin v. Pryor*, 4 Mann. & Gr. 48, 4 Scott, N. R. 655.] [*590]

TINDAL, C. J. The only question in this case is, whether there was any evidence to leave to the jury. The matter left for the consideration of the jury on this declaration was, whether or not the defendant wrongfully put and placed, or caused to be put and placed, in a large heap or mound, great quantities of earth, gravel, &c., upon a certain highway and so caused the accident of which the plaintiff complains. I think there was evidence to leave to the jury in support of that charge. If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor, and not by the individual for whom the work was done.(a) But, upon the evidence, the matter strikes me in a very different light. It appeared that Palmer had contracted to make

(a) Vide *Bush v. Steinman*, *supra*, 585, *contra*.

the drain ; and, perhaps, *prima facie*, it would be his duty to carry away the earth and rubbish : but it further appeared that Palmer had charged the defendant at a certain rate per load for *the removal of three loads.

*591] This was done on the 20th of July, and sufficient was then left to occasion the accident that happened on the 28th. Then, was there no evidence of personal interference on the part of the defendant ? The drain was constructed under his order and for his benefit. He it was that applied to the commissioners of sewers for leave to break into the sewer. And there was the conversation with Barker, the policeman, before the accident, when the defendant, upon being told that the rubbish ought to be removed out of the road, said he would remove it as soon as he could. This was an admission that he was exercising a dominion over it. And, after the accident had happened, being told by the policeman that it had been occasioned by the rubbish so improperly placed in the road, the answer he made was, that he had witnesses to prove that the accident had not been occasioned by the rubbish, but by the plaintiff's careless and reckless driving. All this is evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction. I, therefore, think the case is taken out of the rule in *Bush v. Steinman*, which is supposed to be inconsistent with the later authorities ; and that it is brought clearly within the principle laid down by the court of Exchequer in *Quarman v. Burnett*.

For these reasons, I am of opinion that the verdict ought to stand.

COLTMAN, J. I am of the same opinion. The substantial question to be considered is, whether the allegation in the declaration—that the grievance complained of was the act of the defendant,—was made out by the evidence. The defence set up by Gray was, that he had employed Palmer to do the work, and that he himself did not personally interfere. That naturally called for the expressions of the Lord Chief Justice to which *exception has been taken. I think there was evidence

*592] enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer. There clearly is no ground for disturbing the verdict.

CRESSWELL, J. At the trial a bill of exceptions was tendered upon two grounds : and we may assume that these are also the grounds of objection to the summing up.

The first matter of exception was, that there was no evidence of any orders or direction by Gray, for placing the rubbish on the road. That, however, clearly is not essential to the maintenance of an action of this sort. The jury might infer, from the acts of the defendant, that what was done by Palmer was sanctioned and adopted by the defendant.

The second matter of exception was, that, inasmuch as Palmer did not stand in the relation of a *servant* to the defendant, the latter was not responsible for his acts. Unless Palmer had the entire control of the work, there was abundant evidence to charge the defendant. Palmer

was employed by him to construct the drain. No precise contract for the work was proved; nor was it shown that Palmer was employed to do the work personally, the *mode* of doing it being left to his judgment and discretion. And in the absence of evidence to show that the defendant had parted with all control and authority in the matter, it must be assumed that he adopted all that was done by Palmer in carrying on the work. If it had appeared that Palmer had contracted with the defendant to construct the drain and to cart away the rubbish, it might have been said that the defendant *had* parted with all control. But, far from that, the evidence is that the defendant paid Palmer for the carting away of a portion of it. Then, when remonstrated with by the policeman for leaving the nuisance *on the highway, the defendant promises to remove it as soon as he can. And, when the accident has happened, and the defendant is told that it was occasioned by the rubbish being left there, the defendant says that he has witnesses to prove that it was occasioned by something else. I think there was abundant evidence to show that the defendant at least *sanctioned* the placing of the nuisance on the road, and therefore that he is responsible for the consequences.

EARLE, J. I am of the same opinion. The work was done with the knowledge of the defendant, and under his superintendence, and for his benefit. The language of the defendant was cogent evidence to charge him: he, in a manner, has admitted his liability. He clearly would be liable unless he had parted with the entire control to Palmer, and altogether abstained from personal interference himself. And even if the defendant had parted with the whole control to Palmer, I am at a loss to know why he should not be liable *jointly* with Palmer.(a)

Rule discharged.

(a) Supposing Gray to be liable as a joint tort-feasor with Palmer, he could not, if sued alone, plead the non-joinder of Palmer, either in abatement or in bar. According to the rule laid down in *Bush v. Steinman*, the remedy would be either against the defendant, the employer *paramount*, or against the immediate wrong-doer, the party employed *paravaille*—the person engaged by Palmer to remove the rubbish, and not against the meaner agent, Palmer. And, according to the case of *Beaulieu v. Finglam*, *supra*, 586, n., the defendant would have been liable in respect of his *possession* of the premises.

There seems to be no objection to a joint action against the immediate wrong-doer and the ultimate principal, where, as in the principal case, the act of the immediate wrong-doer appears to be such as would not subject him to an action of *trespass*.

*VALPY and Others, Assignees of BATE and Others, v. [*594
MANLEY. May 6.

A *ft. fa.* issued against B. When the officer went to B.'s premises, on the 11th of July, to execute the warrant, he found a man in possession on behalf of trustees under a deed of assignment executed by B. for the benefit of his creditors. The officer thereupon retired without making a levy. On the 14th a *flat* issued against B., under which he was duly declared bankrupt. On the 15th of August, the officer again entered, and made an inventory of the goods on the premises, asserting that he considered himself in possession. On the 2d of September, the assignees of B. paid the sum claimed under the writ, in order to prevent the sheriff from proceeding to a sale, which he threatened to do:—

Held, that the assignees were entitled to recover back the money so paid, in an action for money had and received to their use; and that, if necessary, it must be assumed, as against the sheriff, that he was, at the time, in possession of the goods.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiffs, as assignees of Bate & Co., bankrupts.

Plea, non assumpsit.

The cause was tried before **ERLE, J.**, at the sittings in London after last Easter term. The following facts appeared:—Until their bankruptcy, Bate & Co. carried on the business of brewers at Rudgeley, in Staffordshire. On the 10th of July, 1844, a writ of *fi. fa.* issued upon a judgment obtained against Bate & Co. at the suit of one Garnston. This writ was sent to the office of the defendant, the sheriff of Staffordshire, at Stafford, where it was received on the 11th. A warrant was immediately granted and put into the hands of an officer, who went with an assistant to the premises of Bate & Co. for the purpose of levying under it. Upon arriving there, the officer was informed that Bate & Co. had that day (the 11th of July) executed a deed conveying all their property and effects to trustees, in trust for the benefit of their creditors. The officer thereupon forebore to make any actual seizure; but said that he considered himself in possession, and would come every day to make
*595] claim, until he knew whether or not the sheriff would interplead; and he left his assistant with the warrant at Rudgeley. On the 14th of July, a fiat in bankruptcy issued against Bate & Co., and a messenger entered and remained in possession. The officer afterwards, viz., on the 15th of August, went in under the sheriff's warrant, and made an inventory of the property, breaking open a cart-shed, and taking out a wagon. On the 2d of September, the messenger under the fiat being still in possession, the assignees sent a clerk to the undersheriff's office at Stafford, to inquire whether or not the sheriff intended to sell: and, upon the undersheriff saying that he did, the clerk paid the amount claimed on the writ, under protest.

On the part of the defendant, it was insisted that that which was done on the 11th of July amounted to a seizure: but, the learned judge expressing a strong opinion to the contrary, it was then contended that the payment was voluntarily made by the assignees, with full knowledge of all the facts, and therefore that they were not entitled to recover back the money. For the plaintiffs it was submitted that the payment was not voluntary, but was made for the purpose of releasing the property from a sort of duress.

The learned judge was of opinion that the wrongful seizure of the goods of another does not amount to duress, so as to justify a voluntary payment, with knowledge of all the facts, in order to obtain their release; on the ground that the owner of the goods must be taken to know his legal rights, and that, if they are invaded, he has his remedy by action.*

A verdict was taken for the plaintiffs, damages 373*l.* 6*s.* 9*d.*, with

liberty to the defendant to move to enter a nonsuit, if the court should be of opinion that the action was not, under the circumstances, maintainable.

**Telford*, Serjt., in the last term, obtained a rule nisi accordingly. He referred to *Lindon v. Hooper*, Cowp. 414; *Atlee v. Backhouse*, 3 M. & W. 633; *Parker v. The Great Western Railway Company*, 7 Mann. & Gr. 253, 7 Scott, N. R. 835; and *Lackington v. Elliott*, 7 Mann. and Gr. 538, 8 Scott, N. R. 275. [*596]

Sir T. Wilde, Serjt., (with whom was J. P. Wilde,) now showed cause. The undersheriff having obtained the money under the pressure of a threat to sell the property, what pretence can there be for saying that the payment was voluntary? The case of *Lindon v. Hooper* has no application. It was there held that an action of this sort would not lie to recover back money paid for the release of cattle taken damage feasant, though the distress were wrongful: but that was so held expressly upon the ground that it was, in the opinion of the court, an inconvenient form of action in which to try a question of that nature. The general principle, however, is perfectly clear, and is well settled by a variety of cases. In *Barrett v. The Stockton and Darlington Railway Company*, 2 Mann. & Gr. 134, 2 Scott, N. R. 337; and *Parker v. The Great Western Railway Company*, money paid for the purpose of inducing the defendants to perform a duty which they otherwise refused to perform, and the non-performance of which would have occasioned inconvenience and loss to the plaintiffs, was held to be recoverable back in an action for money had and received. Another class of cases (within which the present ranges itself) is, where one is in possession of property of another, who has ground for believing that he will sustain inconvenience or loss unless he obtains its release by complying with an extortionate demand. Thus, in *Hells v. Street*, 5 Bingh. 37, 2 M. & P. 96, a tenant distrained upon for rent, requested the broker not to proceed to sale, and engaged, in consideration of forbearance, to pay the broker's charges: time was given, and the charges paid, but the tenant objected to the amount of the charges, and to the amount of rent demanded: and it was held that this was not a voluntary payment, and that the charges, if irregular, might be recovered back in an action for money had and received. It is not necessary, in such a case, that the defendant should, beyond all doubt, possess the power he assumed to exercise: the plaintiff is not to be driven to a contest on the subject: but, if the one party exacts the money under a threat, and the other makes the payment under the influence of that threat, it may be recovered back. Here, the sheriff, throughout, insisted that there had been a valid seizure before the fiat: it does not therefore lie in his mouth to say that the plaintiff's apprehension was groundless. In *McCombie v. Davies*, 6 East, 539, 2 J. P. Smith, 557, Lord ELLENBOROUGH, relying upon a dictum of Lord HOLT, in *Baldwin v. Cole*, 6 Mod. 212, says: "The very assuming to oneself the property, [*597]

and right of disposing, of another man's goods, is a conversion." In *Close v. Phipps*, 7 Mann. & Gr. 589, 8 Scott, N. R. 381, the attorney for a mortgagee, who had advertised a sale of the mortgaged property, under the power reserved to him, upon non-payment of interest, having extorted from the administratrix of the mortgagor money exceeding the sum due for principal, interest, and costs, under a threat that he would proceed with the sale unless his demand were complied with; it was held that the administratrix might recover it back, in debt for money had and received. And in *Snowden v. Davis*, 1 Taunt. 359, post, 603,^(a) it was held that an action for money had and received lies, to recover back *598] money which has been obtained through compulsion, under colour of process, by an excess of authority, although it has been paid over. There, the money was paid to avert a threatened distress: the party was not bound to wait to see whether or not the threat would be carried into effect. It is enough, in all cases, if the circumstances be such that the plaintiff may reasonably expect and apprehend that he will be subjected to the threatened inconvenience unless he comply with the demand, and the payment is made under protest. There are many other cases in which this principle is recognised. To these the only authority that opposes itself is *Knibbs v. Hall*, 1 Esp. N. P. C. 84, where Lord KENYON ruled at nisi prius, that, where a party threatened with a distress for rent pays money, against the payment of which he might legally have defended himself, but does not do it, this shall not be deemed a payment by compulsion, nor shall he be allowed to set it off against another demand. In *Brown v. McKinnally*, 1 Esp. N. P. C. 279, the payment was voluntary; and the ruling proceeded on the ground upon which *Marriott v. Hampton*, 7 T. R. 269, and that class of cases, was determined, viz., that, where money has been paid under compulsion of legal process, to allow the defendant to recover it back would give rise to endless litigation. In — v. *Pigott*,^(b) this form of action was brought to recover back money paid to the steward of a manor, for producing at a trial some deeds and court-rolls, and for which he had charged extravagantly: the objection was taken, that the money had been voluntarily paid, and so could not be recovered back again; but, it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable. [TINDAL, C. J. *599] That was the *authority we mainly relied on in *Parker v. The Great Western Railway Company*.] In *Dew v. Parsons*, 2 B. & Ald. 562, where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law; it was held that the latter might maintain money had and received for the excess paid above the legal fee, or might set off the same in an action by the

(a) And see *Hamlet v. Richardson*, 9 Bingh. 644, 2 M. & Scott, N. R. 811.

(b) Cited by Lord Kenyon in *Cartwright v. Rowley*, 2 Esp. N. P. C. 724.

sheriff against him. In *Shaw v. Woodcock*, 7 B. C. 73, 9 D. & R. 889, it was held that money paid as the only means of recovering possession of property to which the party is entitled, constitutes a compulsory payment, and may be recovered back. Here, the sheriff having avowed an intention to sell, the plaintiff, yielding to the pressure of that threat, paid the money, with notice of his intention to dispute the right. Both principle and authority, therefore, concur to sustain the plaintiff's claim.

Talfourd, Serjt., (with whom was *F. V. Lee*,) in support of the rule. The question here is whether the sheriff was in such a position, as to what he had done or threatened, as to authorize the assignees to put him to his immediate election to claim or to abandon the seizure. He clearly had no such possession as to empower him to carry into effect the threat to sell; nor was any thing done by him in assertion of his right to sell. The payment, therefore, was not a payment under compulsion. [TINDAL, C. J. The question is, whether the circumstances were such as were calculated to induce any reasonable person to believe that he had such power.] It is not because an unfounded claim is made that the party, submitting to it, is entitled to bring an action to recover back the money. [CRESSWELL, J. *Suppose a person against whom the sheriff has [*600 a writ, offers him money, saying he offers it not in satisfaction of the sum mentioned in the writ, but under protest, would the officer be bound to accept it?] Possibly not. In all the cases cited, something more has appeared than in the present case—some immediate power in the recipient to dispose of the property; as in *Close v. Phipps*, 7 Mann. & Gr. 589, 8 Scott, N. R. 381, where the attorney for the mortgagee, having possession of the title-deeds, and a power of sale, threatened to exercise that power unless his exorbitant demand was complied with; (a) and in *Snowdon v. Davis*, 1 Taunt. 359, where the officer was in possession of the goods. In *Atlee v. Backhouse*, 3 M. & W. 633, the facts were these:—On the 1st of September, 1834, a seizure of spirits was made by the officers of excise on the plaintiffs' premises. The plaintiffs applied to the commissioners of excise for the restoration of the spirits, first, on security being given for payment of any penalties incurred, then, on payment of their value, to abide the result of the inquiry, which requests were refused. A writ of appraisement (b) having been sued out, in order to the condemnation of the goods, the plaintiffs proposed to the commissioners to pay the amount at which the goods were appraised, upon their restoration. The commissioners answered "that they could accept no offer for the restoration of the seizure, the acceptance of which might prejudice the proceedings for penalties;" whereupon the plaintiffs stated, that, by their paying the money, "they gave up all claim to the seizure, and held them-

(a) In that case the mortgagee was legally entitled to do that which his attorney threatened should be done. Vide 7 Mann. & Gr. 590, n.

(b) As to the nature of this now obsolete process, and the practice under it, see Mann. Exch. Pract., 2d ed. 146, 147, 149, 165, 174, 183.

several responsible for such proceedings for penalties as the board might
 *601] "think fit to institute." The commissioners thereupon agreed to
 restore the spirits; and accordingly, on the 11th of September,
 1834, the appraised value was paid by the plaintiffs to the defendant, the
 receiver-general of excise, and the spirits were restored to them. An
 information for penalties was subsequently filed against the plaintiffs, in
 which a verdict was taken for the crown, by consent, for a mitigated
 amount of penalties. In November, 1836, the plaintiffs gave the defend-
 ant notice of action, and re-demanded the money, and brought an action
 for money had and received: but the court of Exchequer held that the
 action could not be maintained, on the ground, amongst others, that the
 money was paid on a binding agreement, made upon good considera-
 tion, (a) whereby the plaintiffs agreed that it should not be recoverable
 back. *Lackington v. Elliott*, 7 Mann. & Gr. 538, 8 Scott, N. R. 275, is
 also an authority to show that this action is not maintainable. There,
 the defendant, on the 29th of December, 1842, distrained for 120*l.* arrears
 of rent due to him from one May, at the preceding Michaelmas, the
 goods of May being then in the possession of one C., to whom they had
 on the 13th of December been conveyed in trust for May's creditors: on
 the 3d of January, 1843, it was agreed between C. and the defendant
 that the rent distrained for should be paid, the defendant consenting to
 forego the quarter's rent due at Christmas; and, accordingly, the goods
 were appraised and condemned at 136*l.*, being the amount of the rent
 and expenses, and the money handed over to the defendant. On the
 9th of January, a fiat issued against May, the act of bankruptcy relied on
 being the execution of the deed of the 13th of December: and it was
 *602] held that the assignees were not *entitled, in an action for
 money had and received, to recover back the sum so paid to the
 defendant.

TINDAL, C. J. I am of opinion that the verdict in this case was right,
 and ought not to be disturbed. The question is, whether the payment
 made by the plaintiffs on the 2d of September was a voluntary payment,
 or a payment under a species of duress. It seems to me that all the cir-
 cumstances show, that, when the assignees made the payment, they had
 just and reasonable ground for apprehending that the sheriff would pro-
 ceed to a sale that might have operated injuriously to their interests,
 unless the money were paid. The payment, therefore, was not voluntary,
 but was made for the purpose of averting a threatened evil. The whole
 facts that were in evidence point that way. In the first place, the officer
 was armed with a writ, under which he had power to seize the property.
 In the next place, though the officer had not actually made a levy before
 the date of the fiat, he had been upon the premises, and had said that he

(a) Vide *Longridge v. Dorville*, 5 B. & Ald. 117, 2 Mann. & Ryl. 492, n.; *Penn v. Lord Baltimore*, 1 Ves. sen., 444, 1 Vin. Abr. 309, 3 N. & M. 859, 4 N. & M. 80, 3 M. & G. 181, 5 M. & G. 794, n., 7 M. & G. 544, post, 605.

considered himself in possession, and would come every day to make claim, until he knew whether or not the sheriff would interplead; and on the 15th of August he broke open the door of a cart-shed, and took a wagon, and made an inventory of all the property on the premises. The officer making this sort of continual claim, and insisting that he has made an actual seizure—though it turns out that he has not—I think, that, as against the sheriff, we may assume that he was in possession. All the cases show, that, where a party is in, claiming under legal process, the owner of the goods contending that the possession is illegal, and paying money to avert the evil and inconvenience of a sale, may recover it back in an action for money had and received, if the claim turns out to have been unfounded. Without going through the authorities, it is enough to say that this case falls within the exception in the *dictum* *of [603 Lord KENYON, in *Fulham v. Down*, 6 Esp. N. P. C. 26, n., that, “where a voluntary payment is made of an illegal demand, the party knowing the demand to be illegal, *without an immediate and urgent necessity*, (or, unless to redeem or preserve your person or goods,) it is not the subject of an action for money had and received”—a form of expression which clearly assumes, that, if there be an immediate and urgent necessity, or the payment is made for the purpose of redeeming or preserving one’s person or goods, the right to bring this sort of action exists. Nor am I able to distinguish this case from *Snowdon v. Davis*, 1 Taunt. 359. I am not aware that there is any difficulty or impropriety in laying it down, that, where money is voluntarily paid, with full knowledge of all the circumstances, *the party intending to give up his right*, he cannot afterwards bring an action for money had and received; but that it is otherwise, where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold.

COLTMAN, J. I am of the same opinion. The case of *Snowdon v. Davis* is a full authority for our present decision. It was a very remarkable case. A writ of *distringas* had issued out of the Exchequer, directed to the sheriff of Berks, requiring him to distrain the inhabitants of the borough of New-Windsor by their lands and chattels, and to answer the issues of such lands, so that they should appear to render an account as in an annexed schedule mentioned. The schedule referred to was, in substance—“Upon the inhabitants of the borough of New-Windsor, for the deficiency of G. Dixon and J. Snow, collectors in the said borough, the several sums of 7*l.* 8*s.* 2*d.*, and 74*l.* 2*s.*” Upon this writ, the *sheriff [604 issued a warrant to his bailiff, the defendant, commanding him to distrain the inhabitants of New-Windsor for the insufficiency of Dixon and Snow, for the sums of 7*l.* 8*s.* 2*d.*, and 74*l.* 2*s.* The defendant seems to have misunderstood the effect of the warrant. It authorized him to levy issues of one shilling in the pound; whereas he thought it

authorized the levy of the full amount of the sums therein mentioned, and he, accordingly, demanded those sums of the plaintiff, an inhabitant of the borough, who paid them, obtaining from the defendant a receipt for so much money by him distrained under the writ. A second *distringas* issued, under which the sheriff issued his warrant to the defendant to distrain upon Dixon and Snow, 132*l.* 14*s.* 7*d.* Upon this latter warrant the defendant demanded of *the plaintiff* the 132*l.* 14*s.* 7*d.*, and also 6*l.* 12*s.* 5*d.* for issues. The plaintiff refusing to pay, the defendant seized his goods; whereupon the plaintiff paid both sums, the defendant giving him a receipt for the money as received under the writ, viz., “*distringas*, 132*l.* 14*s.* 7*d.*, issues, 6*l.* 12*s.* 5*d.*” The first payment there was made under circumstances similar to those of the present case; and the court held, that, inasmuch as the money was paid under the terror of a distress, to an officer apparently clothed with some sort of legal authority to receive it, the plaintiff was entitled to recover it back in an action for money had and received, notwithstanding it had been paid over by the officer to the sheriff, and by the sheriff to the Exchequer.^(a) If that case had stood upon the second warrant alone, I think it would have supported our judgment; for, I cannot see much difference between an actual seizure and a threat to seize. The case altogether is a distinct authority to show that the payment in the present case was not a voluntary payment.

*605] *CRESSWELL, J. I am also of opinion that this verdict ought to stand; that the payment in question was not a voluntary payment, but a payment made under that sort of duress which entitles the party making it to bring an action to recover it back.

Two or three classes of cases have been adverted to in the course of the argument. In *Marriott v. Hampton*, 7 T. R. 269, where money had been paid by the plaintiff to the defendants under the compulsion of legal process, which was afterwards discovered not to have been due, it was held, that the plaintiff could not recover it back in an action for money had and received; Lord KENYON observing—“If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person.” *Hamlet v. Richardson*, 9 Bingh. 644, 2 M. & Scott, 811, is to the same effect.

Another class of cases tending to the same result, is that to which *Longridge v. Dorville*, 5 B. & Ald. 117, *suprà*, p. 601, and *Atlee v. Backhouse*, *suprà*, 600, belong—where money paid for the settlement of a *doubtful* claim was held not to be recoverable back.

The present case, however, does not range itself within either of those classes. Here, the plaintiffs did not submit to the demand in the sense that would make the payment voluntary. The money was paid, not in

(a) Vide *Edwards v. Hodding*, 5 Taunt. 815, 1 Marsh. 377; and see 2 N. & M. 303, 3 N. & M. 452, 4 Mann. & Gr. 401.

satisfaction of the writ, but to induce the sheriff to refrain from putting into execution his threat to sell the property. It has been contended that there was no duress; but I think that which the sheriff did, clearly amounted to duress. He claimed to have seized the goods in time. The assignees asserted that there had been no seizure before the issuing of the fiat. The sheriff proceeded to make an inventory, insisted on his possession, *and threatened to follow that up by a sale. If he had actually seized the goods at the time the payment was made, the payment would clearly have been a payment on compulsion: and that which he did was quite sufficient to prevent its being considered a voluntary payment. I entirely agree with my brother COLTMAN in the application of the decision in *Snowdon v. Davis* to the present case, and that a threat to seize and sell would have the same effect as an actual seizure. *Carter v. Carter*, 5 Bingh. 406, 2 M. & P. 732,^(a) is also an authority to show that this was not a voluntary payment. It was there held that a payment of a ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment because the occupier makes it without waiting to be distrained upon. The only distinction between that case and the present is, that there, the taking by the superior landlord would have been lawful; whereas here, a seizure and sale by the sheriff would have been wrongful, because there had been no levy before the issuing of the fiat. It would be an odd thing to hold that money paid under a threat to do something that might rightfully be done, may be recovered back, but that, where the threat is to do something that would be wrongful, the same result is not to follow. Moreover, I think the sheriff can hardly be allowed to say that he had not seized the goods, seeing that the officer, throughout, insisted that he was in possession. The payment having been made, not in satisfaction of the writ, but to avert a sale, and with notice to the sheriff that his right to receive the money would be disputed, I think the plaintiffs are not precluded from maintaining this action.

*ERLE, J. I also think that this rule should be discharged, on the ground that the conduct of the sheriff's officer precludes the sheriff from contending that the payment was voluntary. [*607

Rule discharged.

(a) And see *Sapsford v. Fletcher*, 4 T. R. 511; *Sturgess v. Farrington*, 4 Taunt. 614; *Taylor v. Zamira*, 6 Taunt. 524, 2 Marsh. 220; *Stubbs v. Parsons*, 3 B. & Ald. 516; *Dyer v. Bowley*, 2 Bingh. 94, 9 J. B. Moore, 196.

MOORE v. TUCKWELL. May 7.

On showing cause against a rule nisi for a new trial, on the ground of misdirection, the plaintiff's counsel consented to abandon that part of his demand to which the misdirection applied—the court, without the assent of the defendant, discharged the rule for a new trial, and made the rule absolute as a rule for reducing the damages.

DEBT, for work and labour and materials, with a count upon an account stated.

Pleas, *nunquam indebitatus*, payment, and set off.

The cause was tried before the judge of the sheriff's court, London, on the 15th of April last. The plaintiff claimed 15*l.* 5*s.* 9*d.*, the balance of an account for painting and glazing done by him for the defendant. A set-off for goods sold and delivered was admitted to the extent of 10*l.* 6*s.* Part of the work done by the plaintiff consisted of a sign-board, on which the plaintiff had agreed, for 4*l.* 5*s.*, to paint as follows: "Norway Sufferance Landing Wharf. Powerful Sheers and Crane. N. B.—Coal Depôt," with the city arms on each side. The words "Powerful Sheers and Crane" having been misspelt "Powerful Sherss and Krane," had since been painted out. The city arms were merely sketched in chalk. These several omissions had never been supplied, although the defendant had requested the plaintiff to do so.

On the part of the defendant it was objected that, the contract being entire—for painting the house and the sign-board—the plaintiff was not entitled to recover for any part of the work unless the whole was completed.

*608] The learned judge told the jury that such would be the case, if the contract were entire, unless the defendant adopted part, of which he thought the defendant's calling on the plaintiff to complete the omissions in the board, was *some* evidence; and that, if the defendant adopted part, the plaintiff would be entitled to recover the value of the part so adopted.

The jury found a verdict for the plaintiff, damages 4*l.* 19*s.* 9*d.*, his whole demand, minus the set-off.

Shee, Serjt., on a former day in this term, obtained a rule nisi for a new trial on the ground of misdirection.

Byles, Serjt., contra, submitted that there was no misdirection; and that, though, possibly, the plaintiff may have been liable to a cross action at the suit of the defendant, still he was entitled to recover the value of the work, the benefit of which the defendant had received. [TINDAL, C. J. The plaintiff surely ought to have finished the work properly before he commenced his action; as it at present stands, the sign-board is senseless and useless; and I see *no* evidence of any adoption by the plaintiff. If, however, the plaintiff will consent to the verdict being reduced by the amount of 4*l.* 5*s.*—the sum to which alone the misdirection applies—I

think justice will be answered without sending the cause down to a new trial.]

Shee, Serjt., in support of his rule, insisted that he was, as a matter of right, entitled to a new trial, the verdict being the result of an erroneous direction of the judge; and that the court had no power to compel him to submit to the entering of a verdict different from that which the jury had found.

Cur. adv. vult.

*TINDAL, C. J., now delivered the judgment of the court.

[*609

This was a rule for a new trial, in a case tried before the judge of the sheriff's court, on the ground of misdirection, and upon no other ground; for, by the rule laid down since this mode of trial has taken place, we cannot consider whether the verdict was against evidence or not, the damages being under 5*l*.

Now, the only misdirection being that which related to a separate cause of action amounting to 4*l*. 5*s*., and the plaintiff's counsel, on showing cause, having consented to abandon that sum altogether, we think the whole justice of the case, so far as we can look at it, has been attained by the plaintiff's consenting to reduce the damages, by the whole sum in respect of which such misdirection took place.

It was objected, in argument, that the court has no authority to alter the verdict of the jury. We do not alter the verdict, which still remains a verdict for the plaintiff, with the same amount of damages, unless the plaintiff consents to such alteration: all that we do, is, to secure to the defendant the option of paying 14*s*. 9*d*. only, instead of the sum recovered.

If, at the time the rule was moved for, we had seen the whole of the facts of the case as clearly as we now do, we should not have granted the rule in its present shape, but, as it often occurs, a rule would have been granted, with a condition attached, for a new trial, unless the plaintiff consented to reduce the damages.

It is not the practice, as stated at the bar, that, in all cases where there has been a misdirection, a new trial must be granted *de jure*, because a bill of exceptions might have been tendered; for, where the court can see clearly that real and substantial justice has been done, or may be done, without a new trial, the rule has been refused, see *Edmondson v. Machell*, 2 T. R. 4, and *Twigg v. Potts*, 1 C., M. & R. 89.(a) [*610

We therefore treat this as a rule drawn up in the alternative; and, as the plaintiff consents that the damages shall be reduced, we make the rule absolute for that purpose, and discharge it as to the new trial.

Rule accordingly.

(a) And see *Crease v. Barrett*, 1 C., M. & R. 919, 5 Tyrwh. 458.

WADE v. SIMEON. May 7.

An action by A. against B., to recover the amount of two checks and interest, being at issue in the Exchequer, and the trial appointed for the 7th of December, a negotiation takes place between the attorneys on the 6th, when it is arranged that the record shall be withdrawn, and that B. shall submit to a judge's order for payment of the amount claimed on the 14th, otherwise judgment, and that certain proceedings in Chancery taken by B. against A. shall be withdrawn. An order is accordingly drawn up and served. B. subsequently discovering evidence that he conceives will enable him to substantiate his defence to the action, obtains a rule to set aside the judge's order, upon payment of costs. These costs are taxed and paid to A., who afterwards brings an action in this court against B. for breach of the agreement under which the judge's order was drawn up:

The court refused to stay the proceedings in the second action, it being considered that it was not founded upon *the same cause of action* as the first.

On the 14th of May, 1844, an action was commenced in the court of Exchequer by the plaintiff against the defendant, upon two checks, bearing date, respectively, the 25th of May and the 4th of July, 1840, the one for 1300*l.*, the other for 700*l.* To this action the defendant pleaded, amongst other pleas, that the checks were given for money lost by gaming and playing at hazard, and that the plaintiff took them with notice of that fact. The plaintiff replied *de injuriâ*; upon which issue was joined. The cause stood for trial on the 7th of December, 1844. On *611] the 6th of December, 1844, the defendant's attorney, being unable to obtain evidence to sustain the above plea, an agreement was entered into between him and the plaintiff's attorney, in pursuance of which the following order was made by ALDERSON, B., by consent.

"Upon hearing the attorneys or agents on both sides, and by consent, I do order, that, upon payment of 2000*l.* and interest on the two checks, from the date thereof until payment, the debt due from the defendant to the plaintiff for which this action is brought, together with costs, to be taxed and paid on or before the 14th of December instant, all further proceedings in this cause be stayed; and I further order, that, in case default be made in payment as aforesaid, the plaintiff shall be at liberty to sign final judgment and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment and execution, sheriff's poundage, officers' fees, and all other incidental expenses, whether by *fi. fa.* or *ca. sa.*"

On the 7th of December certain facts were communicated to the defendant's attorney which induced him to believe that he could substantiate the plea above mentioned. He, thereupon, on the 13th of December, took out a summons calling on the plaintiff to show cause why the order of the 6th of December should not be set aside, upon payment of principal and interest into court, and the defendant let in to try the issue. This summons was attended before ROLFE, B., on the 18th, when it was ordered "that, upon the defendant undertaking to pay to the plaintiff interest on 2400*l.* from the 14th instant, at 5*l. per cent.*, if the plaintiff should eventually become entitled to that sum, and provided that the

defendant paid into court 2500*l.* on or before the 23d instant, all further proceedings in the cause should be stayed till the fourth day of the then next term: and that, if such money was not so paid, the summons should be "dismissed with costs." The conditions of this last-mentioned order were duly complied with on the part of the defendant, by [*612 giving the required security, and paying the 2500*l.* into court.

On the fourth day of Hilary term, 1845, the defendant obtained a rule nisi in the court of Exchequer to set aside the order of ALDERSON, B. On the 27th of January, that rule was made absolute; and it was further ordered, "that the plaintiff do proceed to the trial of this cause, and that, in the event of his obtaining a verdict, he be at liberty to enter up judgment therein as of the time he would have been entitled to enter up the same under the said order, had not the same been hereby set aside; that the death of either the plaintiff or defendant previously to the trial of the said cause shall not have the effect of abating the said action, but that such trial shall take place notwithstanding; that the money paid into court by the defendant on the 21st of December, 1844, shall remain therein to abide the event of the said trial and of this cause; and, in case the plaintiff shall ultimately be entitled to recover and receive the same, the plaintiff shall be entitled to charge the defendant with interest at the rate of 5*l. per cent.* from the time it was so paid in; and that the defendant do pay to the plaintiff the costs, to be taxed by the master, of this rule, and of the said order, and of and incidental to restoring the cause to the position in which it stood at the time of the date thereof." The costs of this rule were taxed and paid.

On the day on which that rule was made, the plaintiff commenced the present action, to recover the 2000*l.* and interest, together with interest on 1300*l.* from the 25th of May, 1840, and interest upon 700*l.* from the 4th of July, 1840, until payment, and the further sum of 81*l.* 1*s.* 10*d.*, the taxed costs of the plaintiff in the first action down to the date of the order of ALDERSON, B. *The declaration,—after reciting that an [*613 action had been brought by the plaintiff against the defendant in the court of Exchequer for non-payment of the two checks, and interest, that the cause was at issue and entered for trial, and the trial fixed to take place on the 7th of December, 1844, that the plaintiff had been put to expenses in and about the said action, and that the defendant had, on the 3d of December, caused the plaintiff to be served with notice that he would apply to the court of Chancery for an injunction to restrain the plaintiff from issuing execution in the said action on any judgment obtained by him therein, in case the plaintiff should obtain such judgment—alleged, that, in consideration that the plaintiff, at the request of the defendant would forbear prosecuting, and stay all proceedings in the said action until and upon the 14th of December, 1844, save and except the taxation of the said costs and charges, and the obtaining and drawing up of an order therein, as thereafter mentioned, the defendant then promised the

plaintiff that he, the defendant, would, on that day, pay him the said sums of 1300*l.* and 700*l.*, and interest, together with the said costs and charges; and that, in the event of the defendant not paying the same, the defendant would suffer, and the plaintiff should be at liberty to sign judgment in the said action; and that a judge's order should and might be obtained and drawn in the said action to secure such payment; and that the said notice of the said application and motion to the court of Chancery should be abandoned. The declaration then averred that the record was accordingly withdrawn and the proceedings therein stayed, except, &c.; that the costs were taxed at 81*l.* 1*s.* 10*d.*; and that, although the 14th of December had elapsed, the principal, interest, and costs remained unpaid; that the defendant hindered and prevented the *614] plaintiff from signing judgment in the said action; and that the defendant, in violation of his promise, procured the judge's order to be set aside, &c.

Upon an affidavit of these facts, on a former day in this term,

Kinglake, Serjt., obtained a rule nisi to stay the proceedings in this action, on the ground that the promise on which it was founded was the subject of the order of *ALDERSON*, B., which had been set aside by the rule of court; or for further time to plead.

Channell and *Byles*, Serjts., now showed cause, upon affidavits, stating, amongst other things, that, the cause in the court of Exchequer standing for trial on the 7th of December, 1844, negotiations took place between the respective attorneys, for the final settlement of the matters in dispute; whereupon the plaintiff's attorney agreed to withdraw the record and to give the defendant until the 14th of December to pay the amount of debt and costs, upon condition that certain proceedings instituted on the part of the defendant in Chancery should be abandoned, that the defendant should give a judgment on the 14th of December, in default of payment of the money, and that the means of making that judgment available should be secured by the usual judge's order; that the order of *ALDERSON*, B., was made for the purpose of carrying that agreement into effect; and that an application made to *ROLFE*, B., at chambers—to set aside the proceedings in this cause on the ground now relied on—had been dismissed with costs. This action is brought, not upon the judge's order, but upon an agreement entered into on a good consideration, viz., the withdrawal of the record in an action then standing for trial; and this court has no power to restrain the plaintiff from proceeding to enforce *615] that agreement, one of the terms of which is, that there shall be collateral security by a judge's order. The ground of the dismissal of the summons by *ROLFE*, B., was, that the defence should have been pleaded. The only cases in which the courts will interfere in this summary way are, where the action is brought against good faith, as, in breach of an agreement for a compromise of a former suit, *Mosconi v. Lawson*, 4 Ad. & E. 331; or of an undertaking not to bring an action,

Cocker v. Tempest, 7 M & W. 502; or where proceedings are pending in another court upon the same cause of action. This case does not range itself within either of those classes. The plaintiff is not proceeding here in violation of the compact under which the record in the action in the court of Exchequer was withdrawn: on the contrary, he is seeking to enforce that arrangement. Neither is this an action brought for the same cause as that in the Exchequer. The court of Exchequer may be right in setting aside the order, but that is no reason why this court should stay proceedings in an action on the agreement. The defendant has no *locus standi*. The plaintiff has a right to come here, and ask for the decision of the court. In the Exchequer, the plaintiff sought to recover the amount of the two checks and interest: here, he is suing for a breach of the agreement under which he was induced to abstain from the trial of that action. [CRESSWELL, J. At whose instance was the money ordered to be paid into the court of Exchequer?] All that can be collected from the affidavits is, that Mr. Baron ROLFE imposed that term upon the defendant, conceiving it to be reasonable. The plaintiff has done all that he undertook to do. [TINDAL, C. J. I think the plaintiff should, at all events, abandon the action in the Exchequer. *Channell*, Serjt., consented to do so, provided the plaintiff's claim to the costs of the proceedings in that court down to the time of the agreement, was not to be thereby defeated. *Kinglake*, Serjt., declined to accede.] [*616] In *Dicas v. Jay*, 6 Bingh. 519, 4 M. & P. 285, the plaintiff, an attorney in the country, sued his agent in town for negligence in conducting the plaintiff's business, and alleged in his declaration that he had thereby *become liable to pay* certain sums, and had lost the employment of divers clients. The cause was referred under an order of *nisi prius*, by which the plaintiff consented not to bring any action or suit concerning the premises referred. The order was afterwards made a rule of court, and the arbitrator directed a verdict to be entered for the plaintiff, who afterwards commenced a second action against the defendant, alleging in the declaration that he *had paid* certain sums to persons who had threatened him with actions, and lost the employment of divers other clients, from the negligence of the defendant. The court refused to stay the proceedings in the second action, on motion, notwithstanding they entertained a strong opinion that the recovery in the former action might be pleaded in bar to the latter. *Cocker v. Tempest*, 7 M. & W. 502, shows that the power which the court is here called upon to exercise, is one that requires to be used with great discretion. If the defence had been pleaded, and the plea had been held good, the plaintiff might have brought a writ of error.

Kinglake, Serjt., (with whom was *Barstow*,) in support of the rule. The court of Exchequer has pronounced a decision upon the point now before this court. They held that there was no pretence for setting up the agreement independently of the order. In disposing of the rule for set-

ting aside the order of ALDERSON, B., they held, that, as in order to carry *617] into effect the arrangement *between the parties, an act remained to be done under the authority of the court, it had power, notwithstanding the previous consent of the parties, to interfere, and, if the act to be done was inconsistent with justice, it ought to interfere. (a) [TINDAL, C. J. When the court refuses to grant an attachment for not performing an award, the party is left to his ordinary remedy.] The plaintiff has received the costs of the rule in the court of Exchequer, from which he now dissents. He thereby adopted that rule. [CRESSWELL, J., signified his dissent.] This court will never allow an action to be proceeded in, to the prejudice of rights which the defendant has acquired under a rule or order of another court. [TINDAL, C. J. We must not on light grounds deprive a plaintiff of his common law right of trying his action.] In *Doe d. Carthew v. Brenton*, 6 Bingh. 469, 4 M. & P. 186, the lessors of the plaintiff having brought three actions of ejectment in the court of King's Bench for the recovery of the same property, that court ordered the proceedings in two of them to be stayed, upon certain terms, which were assented to by the counsel for all parties; and a rule was drawn up accordingly. The lessors of the plaintiff afterwards commenced an action of ejectment in this court, upon a later demise; but, as they sought to recover the same property, the court ordered the proceedings to be stayed. [CRESSWELL, J. This defendant would have been very much in the same position with the defendant in that case, if this had been an action upon the checks. TINDAL, C. J. In *Doe d. Carthew v. Brenton*, the tenements sought to be recovered in each action were the same, and the lessors of the plaintiff relied upon the same title in all the actions. Here, *618] the action is not brought upon the *checks, but for a breach of the subsequent agreement. In *Parkin v. Scott*, 1 Taunt. 565, the plaintiff had commenced an action in the King's Bench against the defendant in that action on a policy of insurance, and another on the same policy against Grieves. The proceedings in the former were stayed by a consolidation rule, until the latter should be tried; and, after issue joined in the latter, and while it was in course to be set down to be tried at the sittings after the then term, the plaintiff discontinued his action in the King's Bench against Scott, and commenced an action in this court: and the court stayed the proceedings until after the trial of the cause mentioned in the consolidation rule. The present case is precisely the same in principle. It is substantially the same action. [TINDAL, C. J. If so, you may plead in abatement. CRESSWELL, J. I can understand why the court of Exchequer should refuse to enforce the agreement by summary process. That was not a motion to set aside the agreement.] The plaintiff is seeking to prevent a trial upon the merits.

TINDAL, C. J. It appears to me that the plaintiff has a *prima facie* cause of action on an agreement which he sets out in his declaration, and that

he has a right, by the law of the land, to insist upon having the judgment of the court thereon, either upon demurrer, or by the verdict of a jury, or the judgment of a court of error upon a bill of exceptions, or otherwise, according to the ordinary course of practice. That right being *prima facie* in the plaintiff, we ought to be clearly satisfied that it has been taken away from him by some conduct on his part in the court of Exchequer, before we yield to the present application. Now, I do not understand that court to have done any thing more than decline to lend its assistance by interfering summarily to give effect to the agreement of the parties. The plaintiff insists that there was an agreement which was to be consummated by a rule of court. The court of Exchequer, upon a full consideration of all the facts, came to the conclusion that the order made by Mr. Baron ALDERSON for the purpose of carrying that agreement into effect, was made without authority; and therefore they set it aside. That, however, as it seems to me, leaves the agreement altogether untouched. If this cause goes to trial, the plaintiff will, under the plea of non assumpsit, be put to proof of an actual agreement such as he has alleged. He cannot produce Mr. Baron ALDERSON's order; for, that is rescinded. But, if he can prove the agreement by any other evidence, I do not see what right we have to interpose. If this case had resembled those in which the courts have interfered to stay proceedings taken in breach of good faith, our decision would have been the other way. But I think it is clearly to be distinguished from cases of that sort. Upon the whole, it seems to me that we can do no other than discharge the rule. It is not, however, a case for costs; and the defendant should have a reasonable time—say fourteen days—to plead. [*619]

COLTMAN, J. I am of the same opinion. The cases cited by my brother Kinglake do not, by any means, support his application. In *Doe d. Carthew v. Brenton* the lessors of the plaintiff were seeking to escape from the consequences of a rule into which they had entered by consent. So, in *Parkin v. Scott* the plaintiff was endeavouring to evade a consolidation rule. Here, however, the plaintiff is not seeking to set aside, or to evade, any agreement into which he has entered; but, on the contrary, his complaint is that he has not had the benefit of the agreement. Under these circumstances I do not see what right the court has to prevent his enforcing any rights he may have acquired under that agreement. [*620]

CRESSWELL, J. I am of the same opinion. The plaintiff declares upon an agreement whereby the defendant undertook to pay him a certain sum of money upon a certain consideration, and also to give him a judge's order to enable him to enforce the payment of the money pursuant to the agreement. The court of Exchequer have thought fit to deprive the plaintiff of the benefit of that judge's order: but that court did not, and could not, upon that occasion, decide that there was no such agreement as is alleged. That remains to be seen. If there was no agreement—if there

was no consideration for the agreement, or any fraud in obtaining it, the plaintiff will fail. The case is altogether different from any of those cited. In *Doe d. Carthew v. Brenton*, the lessors of the plaintiff were put to their election as to which of the three actions they would try: the counsel endorsed their briefs for a stay of proceedings in two of the actions, upon certain terms, and a rule was drawn up accordingly: the parties sought to evade that rule by bringing another action for the same property, and founded upon the same title, in this court. BOSANQUET, J., explicitly states that to be the ground of the judgment; for, he says—"The object of this action being to defeat an arrangement which the lessors of the plaintiff have assented to in another court, we are justified in interfering." Of that there could be no doubt. Here, no attempt is made to defeat the arrangement that was come to in the cause in the Exchequer: but the plaintiff is seeking to enforce that arrangement by action, having failed in his attempt to enforce it by an application to the summary jurisdiction of that court.

*621] *ERLE, J. I also am of opinion that this rule should be discharged so far as it relates to a stay of the proceedings. The action in the court of Exchequer was brought upon the checks: the present action, however, is not for the same cause, but for a breach of the agreement under which the proceedings in the former action were stayed. The present action, therefore, is a much more advantageous one for the plaintiff to try, inasmuch as the defences that might have been set up in the court of Exchequer could not be set up here. *Longridge v. Dorville*, 5 B. & Ald. 117, and other cases show that an agreement to give up a doubtful claim is a good consideration for a promise to pay money. It can be no answer for the defendant to say he has since discovered facts which would have made the case clear, and that the agreement he has entered into is an improvident one. With respect to the cases that have been cited, *Wade v. Simeon*, 13 M. & W. 647, in the Exchequer, has no bearing whatever upon this: the court there were merely dealing with Mr. Baron ALDERSON's order. The other cases, viz., where the application is founded upon the fact of the proceeding being in breach of faith, or where another action is pending for the same cause, are equally without application to the present: for, here, there is no breach of faith on the plaintiff's part in suing upon the agreement; and the two actions are founded upon essentially different matters.

Rule discharged without costs, the defendant having fourteen days further time to plead. (a)

(a) See the further proceedings in this action, post, Vol. II.

*NICHOLSON v. JACKSON. May 7.

[*622]

It is no ground for discharging a rule for judgment as in case of a nonsuit, without a peremptory undertaking, that the plaintiff has, since the commencement of the action, discovered that the debt is recoverable in a court of requests.

Quere, whether a writ of trial can be carried down by *proviso*.

BYLES, Serjt., on a former day in this term, obtained a rule nisi for judgment as in case of a nonsuit.

Channell, Serjt., now showed cause, upon an affidavit, which stated, that the action was brought to recover the sum of 3*l.* 7*s.* for goods sold and delivered; that, issue being joined, the defendant by his agent consented to an order for the trial of the cause before the sheriff of the county of Lincoln; that, at the time of the defendant's agent so consenting to such order, he informed the clerk of the plaintiff's attorney's agent, that the defendant resided within the jurisdiction of and was liable to be summoned to the court of requests for the hundred of Elloe in the said county of Lincoln; that the plaintiff's attorney was not aware that the defendant was liable to be sued in the court of requests for the hundred of Elloe until he received such information from his said agent after the defendant had so consented to an order to try before the sheriff, when the plaintiff's attorney caused inquiries to be made, and found such to be the fact; that the act of parliament constituting the court of requests for the hundred of Elloe did not take away a plaintiff's right to sue in the superior courts at Westminster for a debt recoverable in such court of requests, but, in the event of the plaintiff's so suing in the superior courts, and obtaining a verdict, he was thereby deprived of costs; and that, under the circumstances, the plaintiff was unwilling to proceed to trial. The learned serjeant submitted that the justice of the case would be met by entering a *sed processus*; for, *that neither party could obtain costs, the act [*623 providing that the plaintiff should have none if he succeeded, and that the defendant should have double costs(a) in the event only of the judge who tried the cause certifying, which the sheriff had no power to do.

Byles, Serjt., *contra*, insisted that he was entitled to have his rule made absolute, the fact of the plaintiff having improvidently sued in the superior court, affording no excuse for his default in proceeding to trial. [ERLE, J. Can you not carry the cause down by proviso?] There is no authority for the introduction of the proviso clause into the writ of trial.(b)

TINDAL, C. J. The defendant was living within the jurisdiction of the local court at the time the action was brought, and the plaintiff must have known it. I think he must give a peremptory undertaking.

The rest of the court concurred.

Rule accordingly.

(a) Reduced to single costs by 5 & 6 Vict. c. 97.

(b) Or for issuing a second writ with a proviso clause.

DOE dem. WYATT v. BYRON and Others. May 7.

In ejectment upon a forfeiture for non-payment of rent, a *sub-lessee* is entitled to a stay of proceedings on payment of the rent and costs, under the 4 G. 2, c. 28, s. 4.

EJECTMENT, brought to recover the possession of five houses, situate in Park Place, Paddington, for non-payment of rent, and other breaches of covenant. The premises in question were demised by Matthew Wyatt, *624] the lessor of the plaintiff, to one James Steel, by *five several leases, dated respectively the 1st of December, 1841. Steel becoming insolvent, in February, 1842, transferred all his interest in the premises, *save and except the last two days* of the terms created by the above-mentioned leases, to the defendants, as trustees on behalf of themselves and his other creditors. None of the leases containing a proviso for re-entry for breach of any of the covenants therein contained, or for any other cause than non-payment of rent, the defendant's attorney took out a summons to stay the proceedings upon payment of the amount due for rent and costs, under the 4 G. 2, c. 28, s. 4. The parties attended before MAULE, J., when it was insisted on the part of the lessor of the plaintiff, that the provision in the act referred to applied only to *tenants* or their *assigns*, neither of which characters was filled by the defendants, inasmuch as Steel had reserved to himself a reversion of two days. The learned judge made an order, limiting it however to the forfeiture for non-payment of rent.

Byles, Serjt., (on a former day in this term, obtained a rule nisi to rescind that order, on the ground above referred to.

Talfourd, Serjt. with whom was *Addison*,) now showed cause. The courts were in the habit of exercising an equitable jurisdiction to stay proceedings in ejectment, on payment of the rent and costs, before the passing of the statute 4 G. 2, c. 28. *Downes v. Turner*, (a) *Smith v. Parks*, 10 Mod. 383. And in *Roe d. West v. Davis*, 7 East, 363, and *Doe d. Harris v. Masters*, 2 B. & C. 490, 4 D. & R. 45, the statute is treated as confirmatory of a power already inherent in the courts, in cases of application made *before* trial. *The defendants are clearly within *625] s. 2:(b) and it would operate a monstrous hardship if they should

(a) Cited by Holt, C. J., 2 Salk. 597.

(b) Which, after reciting that "great inconveniencies do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties that attend re-entries at common law; and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay of recovering in ejectment, before he can obtain the actual possession of the demised premises; and it often happens, that, after such a re-entry made, the lessee or his assignee, upon one or more bills filed in a court of equity, not only holds out the lessor or landlord, by an injunction, from recovering the possession, but likewise pending the said suit, do run much more in arrear, without giving any security for the rents due when the said re-entry was made, or which shall or do afterwards incur"—enacts, "that, in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due, lath right, by law,

be held not to be within the remedial clause, s. 4. [TINDAL, *C. J. [626
The difficulty is, that there is no privity of estate between the de-
fendants and the landlord.] The defendants stand in the place of the
lessee, on whose behalf the application is substantially made. [CRESS-
WELL, J. It certainly is not easy to see why they should be entitled to
relief in equity, and not at law.] In *Doe d. Whitfield v. Roe*, 3 Taunt.
402, it was held that the mortgagee of a lease has the same title to relief
against an ejectment for non-payment of rent, and upon the same terms,
as the lessee against whom the recovery is had. TINDAL, C. J. That was
before the case of *Williams v. Bosanquet*, 1 Brod. & B. 238, 3 J. B. Moore,
500. ERLE, J. I incline to think that the word "tenant" in the statute
is used in the modern sense—the sense in which it is used in the pro-
ceedings in ejectment.] The statute must have intended to give to the
tenant a remedy commensurate with the right given to the landlord.

*Byles, Serjt., in support of the rule. The defendants, no [627
doubt, may have relief in equity, as they might have had if the
case had occurred before the statute, the effect of which was, not to
extend, but to restrain the relief before given. Sect. 3,—which was
evidently intended for the relief of the landlord—enacts, "that, in case
the said lessee or lessees, his, her, or their assignee or assignees, or other

to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any
formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised
premises, or, in case the same cannot be legally served, or no tenant be in actual possession of
the premises, then to affix the same upon the door of any demised messuage; or, in case such
ejectment shall not be for the recovery of any messuage, then upon some notorious place of the
lands, tenements, or hereditaments, comprised in such declaration in ejectment; and such affix-
ing shall be deemed legal service thereof; which service or affixing such declaration in eject-
ment shall stand in the place and stead of a demand and re-entry; and, in case of judgment
against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made
appear to the court where the said suit is depending, by affidavit, or be proved upon the trial,
in case the defendant appears, that half a year's rent was due before the said declaration was
served, and that no sufficient distress was to be found on the demised premises, countervailing
the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and
in every such case the lessor or lessors in ejectment shall recover judgment and execution, in
the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and,
in case the lessee or lessees, his, her, or their assignee or assignees, or the person or persons
claiming or deriving under the said leases, shall permit and suffer judgment to be had and reco-
vered on such ejectment, and execution to be executed thereon, without paying the rent and
arrears, together with full costs, and without filing any bill or bills for relief in equity within
six calendar months after such execution executed; then and in such case the said lessee or
lessees, his, her, or their assignee or assignees, and all other persons claiming and deriving under
the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other
than by writ of error for reversal of such judgment in case the same shall be erroneous, and the
said landlord or lessor shall from thenceforth hold the said demised premises discharged from
such lease; and if on such ejectment verdict shall pass for the defendant or defendants, or the
plaintiff or plaintiffs shall be nonsuited therein, except for the defendant or defendants not con-
fessing lease, entry, and ouster, then in every such case such defendant or defendants shall have
and recover his, her, and their full costs: Provided always, that nothing herein contained shall
extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who
shall not be in possession, so as such mortgagee or mortgagees shall and do within six calendar
months after such judgment obtained and execution executed, pay all rent in arrear, and all costs
and damages sustained by such lessor, person or persons entitled to the remainder or reversion
as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the
first lessee or lessees, are or ought to be performed."

person or persons claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall, within the time aforesaid, file one or more bill or bills for relief in any court of equity, such person or persons shall not have or continue any injunction against the proceedings at law on such ejectment, unless he, she, or they do or shall, within forty days next after a full and perfect answer shall be filed by the lessor or lessors of the plaintiff in such ejectment, bring into court, and lodge with the proper officer, such sum and sums of money as the lessor or lessors of the plaintiff in the said ejectment shall, in his, her, or their answer, swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and, in case such bill or bills shall be filed within the time aforesaid, and after execution is executed, the lessor or lessors of the plaintiff shall be accountable only for so much and no more as he, she, or they shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his, her, or their entering into the actual possession thereof; and, if what shall be so made by the lessor or lessors of the plaintiff happen to be less than the rent reserved on the said lease, then the said lessee or lessees, his, her, or their assignee or assignees, before he, she, or they shall be restored

*628] to his, her, or their possession or possessions, "shall pay such lessor or lessors, or landlord or landlords, what the money so by them made fell short of the reserved rent for the time such lessor or lessors of the plaintiff, landlord or landlords, held the said lands." Then comes sect. 4, which, for the relief of the tenant, provides and enacts "that, if the *tenant or tenants*, his, her, or their *assignee or assignees*, do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then, and in such case, all further proceedings on the said ejectment shall cease and be discontinued; and, if such lessee or lessees, his, her, or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him, her, or them." These defendants are not within the protection of that clause, even assuming the word "tenant" there to mean "tenant in possession," as has been suggested; for they defend, under the rule, *as landlords*. That, however, clearly is not the sense in which the word tenant is used in the act. [CRESSWELL, J. It certainly is used in that sense in one part of sect. 2.] In this clause it means no more than "lessee." If the court extend the remedy to the sub-lessee, they will give it to one who is not bound to perform the covenants in the lease, and to whom, therefore, the act never could have been intended to apply.

Downes v. Turner, 2 Salk. 597, and *Smith v. Parks*, 10 Mod. 383, are no authorities for this application. In the former, the court stayed the proceedings, upon the defendant's accepting a new lease, * (the entry putting an end to the original term,) and sealing a counterpart, in addition to bringing the amount of rent into court. And as to *Roe d. West v. Davis*, 7 East, 363, and *Doe d. Harris v. Masters*, 2 B. & C. 490, 4 D. & R. 45, it was enough to hold in those cases that an application *after* trial was too late: they determined nothing more. [*629]

TINDAL, C. J. We must not decide this case upon the particular circumstances of difficulty in which the landlord has placed himself by his omission to stipulate in the leases for a right of re-entry for other breaches besides non-payment of rent; and our decision must be the same as if all the other covenants had been duly performed. The difficulty in which the lessor of the plaintiff finds himself, arises from his own neglect in not extending the proviso for re-entry to the case of a breach of any of the covenants, or in not restraining the lessee from sub-letting. The question turns more immediately upon the fourth section of the statute. We are not, however, limited to the consideration of that clause, but are at liberty to resort to any other part of the act, in order to see whether the words "tenants or assigns" are to bear the limited construction contended for on the part of the lessor of the plaintiff. Comparing the terms of the fourth section with those of the second, it seems to me that the word "tenant" is large enough to embrace an under-lessee. By section 2, a provision is made in favour of the landlord—that, "in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving title under the said leases, shall permit and suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and *arrear, together with full costs, and without filing any bill or bills for relief in equity [*630] within six calendar months after such execution executed, then, and in such case, the said lessee or lessees, his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease." The persons who are thus debarred of remedy are, the lessee or lessees, his, her, or their assigns, or sub-lessees, or other persons claiming or deriving under the lease. And, when we come to section 4—which was intended for the benefit of the tenant or lessee—one would naturally expect to find its terms co-extensive with those of the previous section, and sufficient to embrace all those whose remedy was thereby barred. The words are: "If the tenant or tenants, his, her, or their assignee or assignees, do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his,

her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then, and in such case, all further proceedings on the said ejectment shall cease and be discontinued." It seems to me that it would be singular to hold that a stricter and closer sense is to be given to the word "tenant" in section 4, which is dealing with the relief to be afforded to the lessee and those claiming under the lessee, than in section 2, which deprives of remedy both lessees and sub-lessees. It is further to be observed, that the fourth section does not, in terms, require the rent to be paid by *631] the person from whom it is due; the requisites of the act would be as well answered by a payment by an intermediate party. (a) I am therefore of opinion that the fourth section—which is a remedial one, and is to be construed accordingly—does comprehend persons circumstanced like these defendants, and consequently that this rule should be discharged.

COLTMAN, J. This case has been ingeniously argued on the part of the lessor of the plaintiff; but it appears to me that the argument used seeks to enforce too critical a construction of the statute. The main objects of the act were, the more easy recovery of rents, and the renewal of leases—securing to the landlord the rent due in respect of the land, without reference to any other covenants in the lease. Our construction should be such as to forward those objects, and not such as to restrain the effect of it on account of some difficulty which it was not the intention of the act to relieve against. The argument we have heard is founded mainly on the omission from sect. 4 of the words "or other person or persons claiming or deriving under the said leases," which are found in sect. 2, and which, it is said, would also have been found in sect. 4, if such had been the intention of the legislature. The argument would have had more weight if the expression had been "lessee or lessees, or his, her, or their assignee or assignees," as in the previous section; but the fourth section changes the phraseology, and substitutes for lessee or *632] lessees, "tenant or tenants," which latter words admit of a far more enlarged interpretation. The second section also speaks of a "tenant in actual possession of the premises," which is a much more extended description than "lessee or lessees." The construction we are now putting upon the act gives to the landlord all the advantages it was intended to give him, viz., security for the payment of his rent. For these reasons, I think there is no ground for setting aside my brother MAULE's order.

CRESSWELL, J. The order is couched in guarded terms, to relieve the defendants from the forfeiture by reason of non-payment of rent: and it

(a) So, in a case of a mesnalty, when the tenant paravaile was distrained upon by the lord paramount, the mesne, or intermediate, tenant might pay the rent, or might, if the lord refused to receive the rent, put his own cattle into the pound in substitution for the cattle of his tenant. In the principal case, however, the party willing to pay the rent is not the intermediate tenant, but the tenant paravaile.

is with a view to that point only that we are called upon to put a construction upon the statute. My brother *Byles* points out a great hardship on the landlord, inasmuch as the sub-lessee is under no liability to him. Our construction, however, would be the same, even if the lease had contained a proviso for re-entry for a breach of any of the covenants; for, if there be any other ground of forfeiture than the non-payment of rent, the order does not interfere with it; and if the lessor is damaged by reason of the insufficiency of the proviso for re-entry, that is his own fault. We cannot take into consideration the nature and contents of the underlease. Now, the statute contemplates two states of things. The second section gives certain facilities to the landlord. It supposes an action of ejectment brought by him for the non-payment of rent; and enacts, that, in case the lessee or assignee, or other person claiming or deriving under the lease, allows the action to go on to judgment and execution, without paying the rent and costs, and without filing any bill for relief in equity within six months after such execution executed, then the lessee or assignee, or other person claiming and deriving under the lease, shall be barred from all relief or remedy in law *or equity. Sect. 3 provides, that, in case the said "lessee or lessees, his, her, or their

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assignee or assigns, or other person or persons claiming any right, title, or interest in law or equity, of, in, or to the said lease," shall, within the time mentioned in the previous section, file a bill in equity for relief, unless he shall, within forty days after the filing of the answer, pay the rent and costs into court, he shall not have an injunction to restrain the proceedings at law. That section applies to proceedings in equity *after* judgment. The fourth section applies to the case of a party coming to the court in which the action is brought, for relief *before* judgment. In the latter part of sect. 2, the phrase is changed, the words "or other person or persons claiming," &c., being omitted. A similar change of phrase is to be observed in sect. 4; it begins with enacting "that, if the *tenant or tenants*, his, her, or their assignee or assigns, do or shall at any time before the trial in such ejectment pay, or tender, to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued:" and then it goes on—"and if such *lessee or lessees*, his, her, or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him, her, or them." The second and third sections clearly applying to sub-lessees, why should not the fourth, also, the words of which are large enough to embrace them? I think, that, in order to put a consistent construction upon the whole act, we must construe the word "tenant" as meaning something more than lessee

*634] *or assignee. For these reasons, I think the order made by my brother MAULE ought to stand.

ERLE, J. I also am of opinion that the order in question ought to stand. The legislature contemplated the reservation of a right of re-entry as a mode of enforcing the payment of rent. Therefore it provides, that, where the lessor brings an action of ejectment founded upon a forfeiture for non-payment of rent, if the tenant pays the rent and costs before trial, the contract is to be considered as having been performed, and the tenancy under the lease shall continue. Construing the statute with a view to this relief, it appears to me that our decision is fully borne out. The second section uses the expression "tenant in possession of the premises." Any person may be the tenant in possession in an ejectment: and it seems to me that the word "tenant," in sect. 4, is used in this modern sense, meaning the person against whom the ejectment is brought.

Regard being had to the various modes of expression adopted in these three sections, I think it is quite clear that the word "tenant" in sect 4 is used in a much wider sense than lessee. Rule discharged.

*635]

*AYLING v. GOLDRING. May 8.

The plaintiff in an action of crim. con. having been nonsuited in consequence of the accidental absence of his attorney, the court granted a new trial on payment of costs, as between attorney and client, it appearing that another action might be barred by the statute of limitations, and the plaintiff be thereby precluded from taking ulterior proceedings.

THIS was an action for criminal conversation. The writ was sued out on the 16th of May, 1844. Notice of trial was given for the next Summer assizes for Sussex; but the plaintiff's attorney, being unable to discover the place of abode of certain witnesses whose testimony he deemed material, countermanded such notice. He again gave notice of trial for the last Spring assizes, and employed another attorney to set the cause down for trial, he himself being obliged to proceed to Chichester and elsewhere to collect his witnesses. On reaching Lewes in the afternoon of the day after the commission-day, which he was unable to do sooner, he found that, owing to the cause having been entered earlier than he had expected it to be entered, it had already been called on, and the plaintiff nonsuited.

C. Jones, Serjt., on a former day in this term, obtained a rule nisi to set aside the nonsuit, and for a new trial, on payment of costs. The affidavit upon which he moved detailed the above facts, and further stated, that, unless the nonsuit were set aside, the plaintiff would be without remedy, inasmuch as his cause of action would be barred by the statute of limitations.

Channell, Serjt., having showed cause, and C. Jones, Serjt., having been heard in support of the rule,

TINDAL, C. J., said—If this had been a case where the nonsuit was the result of negligence on the part of the plaintiff's attorney, so that the client could have an action against him, and so recover to the full extent *to which he was thereby damnified, I should not have been disposed to interfere. But, in this form of action, which may be intended as a preliminary step to ulterior proceedings, and where the consequences, as regards the future comfort and happiness of the man, are so serious, I do not think he ought, under the circumstances, to be shut out from the opportunity of trying the cause. Upon the terms, therefore, of his paying the costs *as between attorney and client*, I think this rule should be made absolute. [*636]

The rest of the court concurred.

Rule absolute accordingly.

BROOKS v. ROBERTS. May 8.

After regular appearance entered for the defendant, *sec. stat.*, a motion to set aside the declaration and subsequent proceedings on the ground that the defendant has not been served with process, is too late. The application should have been, to set aside the appearance.

SHEE, Serjt., on a former day in this term, obtained a rule calling on the plaintiff to show cause why *the declaration and subsequent proceedings* in this action should not be set aside, upon an affidavit that the defendant had never been served with any process, and that the receipt of the notice of declaration was the first intimation he had of an action having been commenced against him at the suit of the above-named plaintiff.

Channell, Serjt., now showed cause, upon affidavits detailing the circumstances under which the service of the writ of summons was supposed to have been effected, and stating that an appearance was duly entered for the defendant according to the statute on the 26th of April last. He submitted, that, there being a regular *appearance on the files of the court, the declaration must be taken to have been well filed, and consequently that the motion was misconceived. [*637]

Shee, Serjt., in support of his rule, insisted that, inasmuch as an appearance according to the statute could only be entered upon a personal service of the writ of summons, and there had been no such service, the defendant was entitled to treat the appearance as a nullity.

TINDAL, C. J. This rule must be discharged. There being a seemingly regular appearance in the books of the court, if that has been entered without authority, the application should have been to set it aside. There is, so long as the appearance remains, no irregularity in the *declaration*. In *Hesker v. Jarmaine*, 3 Tyrwh. 381, 1 C. & M. 408, where a writ was irregular, and the defendant moved to set aside the *service* for irregularity, the court discharged the rule; BAYLEY, B., saying—"If in this case you had applied to set aside the writ and service, or writ or

service, the court might have made the rule absolute as to the one, though not as to the other. In this case a true copy of the writ has been duly served. If it had not been a true copy, or if it had not been properly served, we should have set aside the service for irregularity. Where you object to the *service* of the writ, you ought to show some deficiency in the *service*." That case was decided in the year 1833. In 1835, I find another case of *Edwards v. Danks*, 4 Dowl. P. C. 357, where proceedings were taken on a bail-bond before default in the original action, and it was held that the mode of taking the objection was, by moving to set aside the writ itself, and not the service of it; Lord ABINGER observing—"This motion supposes a defect in the *service*, which does not exist." So, here, this motion supposes an irregularity in the declaration, for which there is no warrant. The fault, if fault there be, is higher up, viz., in the appearance. The motion should have addressed itself to that.

The rest of the court concurred

Rule discharged.

MURRAY v. SILVER. May 8.

A rule to discontinue cannot be taken out during a rule, with a stay of proceedings.

THE defendant having obtained a rule *nisi* for judgment as in case of a nonsuit, which was drawn up in the usual form, with a stay of proceedings, the plaintiff, pending that rule, took out a rule to discontinue upon payment of costs.

Dowling, Serjt., on a former day, obtained a rule calling upon the plaintiff to show cause why the rule to discontinue should not be set aside, with costs, on the ground that it was a proceeding in the cause, taken whilst the proceedings were stayed by the former rule. He cited *Lowe v. Peacock*, Barnes, 316. There, the defendants obtained a rule to show cause why judgment as in case of a nonsuit should not be entered. The plaintiff afterwards had a rule to show cause why he should not have leave to discontinue, which was enlarged; and both rules came on together. The court held the application for leave to discontinue after the first motion, wrong, and made the rule absolute for a nonsuit.

*639] **Channell*, Serjt., now showed cause. Where a defendant applies to the court for relief, he is entitled, upon notice to the other side, to a stay of proceedings, the object of the rule being that he shall not be placed in peril by the proceeding of his opponent in the mean time. That rule, however, can have no application to a case of this sort, the rule to discontinue not being a proceeding in the cause, out an abandonment of it. The case of *Lowe v. Peacock* can hardly be considered an authority.

Nowing, Serjt., in support of his rule. It is difficult to conceive how a rule made in a cause can be deemed other than a *proceeding* in the cause. As well might it be contended that a final judgment is not a proceeding. [CRESSWELL, J. The rule to discontinue is a rule absolute; in *Lowe v. Peacock* it appears to have been a rule nisi.] The rule to discontinue, in modern practice, is a side-bar rule obtained without the consent of the court. Although in form a rule absolute, it does not operate a discontinuance until the costs are taxed and paid.

TINDAL, C. J. It is difficult to say that taking out a rule to discontinue, is not taking a step in the cause. In order to perfect it, the plaintiff must go on and procure the costs to be taxed; which clearly would be taking a proceeding in the cause. And, as there is a case upon the subject, the authority of which I do not see reason enough to dispute, I think the rule must be made absolute.

The rest of the court concurred.

Rule absolute.

*GIBBS v. TUNALEY. May 8.

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The court will not allow additional affidavits to be filed in support of a motion for a new trial, after the expiration of the time for moving.

In an action against a surgeon for negligence, whereby the plaintiff lost his leg, a verdict being found for the plaintiff with nominal damages, the court refused to grant a new trial, the judge having expressed himself satisfied with the verdict.

THIS was an action upon the case against a surgeon for negligence. At the trial before PARKE, B., at the last assizes at Norwich, it appeared, that, on the 6th of August last, the plaintiff, a boy about fourteen years of age, who was working on the Brandon Railway, received a severe injury by a truck going over his ankle; that the foot was on that day bandaged by a druggist residing at Wymondham; and that, in consequence (as was alleged by the plaintiff's witnesses) of the improper conduct of the defendant,—a surgeon who was called in to attend the plaintiff,—in permitting the bandage to remain untouched until Monday the 12th of August, the foot, by reason of the circulation being impeded by the undue pressure, mortified, and the plaintiff was ultimately obliged to undergo amputation of the limb.

The defendant's groom, who was called as a witness on the part of the defendant, swore, amongst other things, that he was with his master on Wednesday, the 8th of August, and then saw him remove the bandage from the plaintiff's foot, and place it in a splint.

The learned baron told the jury, that, if they thought the defendant had been guilty of *any* degree of negligence, the plaintiff would be entitled to nominal damages; but that, if they were of opinion that the loss of the plaintiff's limb was attributable to the defendant's carelessness and want of skill, then they ought to give serious damages.

The jury returned a verdict for the plaintiff, damages one farthing.

*641] **Byles*, Serjt., on a former day in this term, moved for a new trial, on the ground that the damages were grossly disproportioned to the injury sustained from the defendant's negligence and unskilfulness; and upon affidavits of the plaintiff and his mother, and of other persons, (all of whom, with one immaterial exception, were called at the trial,) impeaching the testimony of the groom, as to the fact of his having been present with his master on Wednesday, the 8th of August, and having then seen him remove the bandage from the plaintiff's foot, and place the foot in a splint; the affidavits of the plaintiff and his mother distinctly stating that the foot was not placed in a splint until Thursday, the 9th, and the bandages not removed until Monday, the 12th.

Cur. adv. vult.

On the fifth day of the term, *Byles* produced additional affidavits, sworn on the preceding day, but only just received in London. The court, however, refused to allow them to be filed; CRESSWELL, J., observing that the courts are very peremptory in rejecting affidavits not delivered within the proper time for moving.

TINDAL, C. J., now delivered the judgment of the court.

In this case, which was an action against a surgeon for negligence, and in which the plaintiff had a verdict, with one farthing damages, a motion was made for a new trial, on the ground of the inadequacy of the damages, and on affidavits in contradiction of the evidence given, on the defendant's behalf, by his groom.

It is not usual with the courts to grant a new trial on the ground that the damages are smaller than the court may think reasonable: *Rendall v. Haywood*, 5 New Cases, 424, 7 Scott, 407, 2 Arn. 14. And in the case *642] of *Haywood v. Newton*, 2 Stra. 940, the court said it *was never done. At any rate, a new trial ought not to be granted on such a ground, unless the judge who tried the cause is dissatisfied with the smallness of the damages, which, as the learned judge has informed us, is not the case in the present instance.

In reference to the second ground on which this application is made, it is to be observed that the evidence given by the witness whose testimony is impeached, cannot be looked upon as evidence coming by surprise upon the plaintiff, seeing that it was evidence directly applicable to the issue which the plaintiff came to try, and being such as he ought then to have been prepared to rebut. (a) We ought, therefore, not to grant a new trial, unless it is made out, that, on a second trial, the position of the plaintiff will be materially different from that he was in at the former trial.

On examining the affidavits in support of the application, it appears to

(a) Qu. whether the fact of the bandages not being removed before Monday, would not be the subject of evidence to be given in chief; and whether witnesses to disprove the alleged removal on Wednesday, would have been sought for if the statement had no foundation in fact; and, whether, supposing the mother to have heard the groom's evidence, it is probable that she would tender herself as a witness in reply?

us that the only affidavits which state any material facts tending on any solid ground to impeach the testimony of the defendant's groom, are, the affidavits of the plaintiff himself, which cannot be used on a second trial, and that of the plaintiff's mother, who was examined on the plaintiff's behalf on the last trial, and might, on that occasion, have given in court (a) the evidence which she now tenders on affidavit.

We think, therefore, that there is in this case no sufficient ground for granting a rule. Rule refused.

(a) See note to previous page.

*CONWAY and Others v. NALL. May 8.

[*643

Quere, whether a general notice that a party has committed an act of bankruptcy, is a notice of an act of bankruptcy within the meaning of the statute 2 & 3 Vict. c. 29.

A notice to the following effect:—"J. S. has committed an act of bankruptcy. He signed a declaration of insolvency yesterday. J. S. will be declared bankrupt immediately. I have sent for a fiat"—is not such a notice as will deprive an execution-creditor of the protection of the 2 & 3 Vict. c. 29; the sixth section of the 6 G. 4, c. 16, requiring the declaration of insolvency to be filed, and to be advertised in the London Gazette, before it is a complete act of bankruptcy.

AFTER judgment for the plaintiffs in this case, a feigned issue, in which Mason and others, assignees of Nall, a bankrupt, were to be plaintiffs, and Conway and others, defendants, was directed for the purpose of trying whether or not the assignees of Nall were entitled to the proceeds of his goods sold under a *fi. fa.*

The issue was tried before TINDAL, C. J., at the sittings in London after Michaelmas term last, when the following facts appeared:—Nall, who was a trader at Chesterfield, being indebted to Conway & Co., the plaintiffs in the action, and defendants in the issue, in 135*l.* for goods sold and delivered, a judgment was signed against him upon a judge's order, on the 28th of March, 1844. On the 30th of March, a writ of *fi. fa.* was issued against him, directed to the sheriff of the county of Derby; and, on the 3d of April, at about one o'clock in the afternoon, the sheriff seized the goods upon Nall's premises. They were afterwards sold, and the proceeds were brought into court.

On the 1st of April, a declaration of insolvency was signed by Nall at Chesterfield. On the 2d, one Gillett, an attorney, addressed the following letter from Chesterfield to the plaintiffs in London:—

"Gentlemen,—To save you expense, I think it right to inform you that Mr. John Nall, of this place, grocer, has committed an act of bankruptcy. He signed a declaration of insolvency yesterday.(a) My clients, Messrs. R. & B., bankers here, are the principal credi-

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(a) It is not said, "by signing a declaration of insolvency yesterday." It might therefore, perhaps, be contended that this letter contains nothing which expressly cuts down the notice that Nall had committed an act of bankruptcy, and it might be said that such notice was rather confirmed than weakened by the statement that he would be declared a bankrupt, and that a

tors, and are in possession of all his property for the equal benefit of creditors. Nall will be declared bankrupt immediately. I have sent for a fiat. I am afraid he is deeply in debt, and that the estate will produce but a small dividend. He, however, states otherwise."

This letter was received by the plaintiffs in London, *about nine o'clock in the morning of the 3d of April*. The declaration of insolvency arrived in London by the same post, and was filed at the office of the Lord Chancellor's secretary of bankrupts, *at eleven o'clock in the morning of the same day*.

On the part of the defendants (in the issue) it was objected that the letter of the 2d of April was not a sufficient notice of an act of bankruptcy within the statute 2 & 3 Vict. c. 29, s. 1. His lordship directed a verdict to be entered for the plaintiffs, (in the issue,) reserving the question for the opinion of the court.

Sir T. Wilde, Serjt., in Hilary term last, accordingly obtained a rule nisi to enter a verdict for the defendants in the issue.

Telford, Serjt., (with whom was *Warren*,) now showed cause. The *645] question turns mainly upon the "construction of the statute 2 & 3 Vict. c. 29, s. 1, which renders valid all executions and attachments against the lands and tenements or goods and chattels of the bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, notwithstanding any prior act of bankruptcy, provided the person at whose suit such execution or attachment shall have issued, had not, at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed. The cases of *Whitmore v. Robinson*, 8 M. & W. 463, 1 Dowl. N. S. 135, and *Stacy v. Carter*, 11 M. & W. 571, 2 Dowl. N. S. 831, are express authorities to show that the 2 & 3 Vict. c. 29, s. 1, does not repeal the 108th section of the 6 G. 4, c. 16. Then, as to the meaning of the letter of the 2d of April. It is not a mere general notice that the party has signed a declaration of insolvency; but it contains a distinct statement that he has committed an act of bankruptcy. In *Spratt v. Hobhouse*, 4 Bingh. 173, 12 J. B. Moore, 395, L. was possessed of the lease of a public-house, which was deposited with the defendants as a security for 1275*l.* 14*s.* 7*d.* due to them from L. T., having a sum of 650*l.* in the hands of the defendants, agreed with L. to purchase his lease, &c., for 1690*l.* 3*s.* 11*d.*; but, he not having sufficient to complete the purchase, the defendants consented to advance the sum required, retaining the lease as security. L., T., and one D., a clerk or the defendants, met to effect the transfer, when T. drew a draft on the defendants in favour of L. for 1690*l.* 3*s.* 11*d.*, which was handed over to D., who, on L.'s executing the transfer to T., gave him a draft on the defendants for 414*l.* 8*s.* 6*d.*, the difference between the amount of their fiat had been sent for. If, however, it had been intended by the legislature that notice that the party had "committed an act of bankruptcy" should be sufficient, it might have been expected that the terms used to express that intention would have been "notice of a prior act of bankruptcy," not "notice of any prior act of bankruptcy."

debt and that of the purchase-money. L. had committed an act of *bankruptcy, and the defendants received notice from a creditor not to pay the draft, as *a docket would be struck against him*. The defendants refused to pay the draft when presented, but they afterwards paid it under an indemnity: and it was held, that the assignees of L. might recover the amount from the defendants in an action for money had and received; and that the defendants had sufficient notice of the bankruptcy of L. In *Ramsey v. Eaton*, 10 M. & W. 22, 2 Dowl. N. S. 219, the Court of Exchequer intimated an opinion that a general notice to a creditor that the debtor has committed an act of bankruptcy, is sufficient, without stating the nature of it: and a similar inclination of opinion appears in *Hocking v. Acraman*, 12 M. & W. 170, 1 Dowl. & L. 434, though the court held that notice of a docket having been struck is not "notice of any prior act of bankruptcy" within the meaning of the 2 & 3 Vict. c. 29. Lord ABINGER there says: "I do not go the length of saying that there must be notice of some specific act, but I say that there must be a notice that the party has committed an act of bankruptcy." [CRESSWELL, J. Can a man be said to have notice of an act of bankruptcy, where the party giving the notice does not condescend on any thing specific? TINDAL, C. J. The notice does point to something specific, namely, the act of signing the declaration of insolvency, which is not a complete act of bankruptcy until something has been done upon it.] It would be complete when filed, which it was at eleven o'clock in the morning of the 3d of April.

Sir T. Wilde, Serjt., (with whom was Bovill,) in support of the rule. The policy of the bankrupt law has, for a series of years, gradually been relaxed in favour of *bond fide* dealings by creditors with the bankrupt. The 1 Jac. 1, c. 15, s. 14, provides "that no debtor of the *bankrupt be hereby endangered for the payment of his or her debt truly and *bond fide* paid to any such bankrupt before such time as he shall *understand or know that he has become a bankrupt*." By the 19 G. 2, c. 32, s. 1, it is enacted, "that no person who is, or shall be, really and *bond fide* a creditor of any bankrupt for and in respect of goods really and *bond fide* sold to such bankrupt, or in respect of any bill or bills of exchange really and *bond fide* drawn, negotiated, or accepted by such bankrupt in the usual or ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate, any money which, before the suing forth of such commission, was really and *bond fide* due, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice, that he is become a bankrupt, or that he is in insolvent circumstances." That clearly means that the notice the party is to have shall be something that is equivalent to knowledge. The 46 G. 3, c. 135, s. 1, went a little further; enacting, "that, in all cases of commissions of bankrupt hereafter to be issued, all conveyances by, all

payments by or to, and all contracts and other dealings and transactions by and with, any bankrupt, *bond fide* made and entered into more than two calendar months before the date of such commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual, to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt, had not, at the time of such conveyance, payment, contract, dealing, or transaction, *any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment.*" The 49 G. 3, c. 121, *s. 2, *648] enacted, that, "in all commissions of bankrupt hereafter to be issued, all executions and attachments against the lands and tenements or goods and chattels of the bankrupt *bond fide* executed or levied more than two calendar months before the date and issuing of such commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy had been committed; provided the person at whose suit such execution or attachment shall have issued, had not, at the time of executing or levying the same, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment: provided always that *the issuing of a commission of bankrupt*, although such commission shall afterwards be superseded, *shall be deemed such notice*, if it should appear that an act of bankruptcy had been actually committed at the time of issuing such commission." That provision, however, was found to operate too harshly, and was soon repealed. The object of the legislature has thus from time to time been to modify the doctrine of relation; which is now altogether destroyed. A creditor is only to be deprived of the fruits of his execution, upon proof that he had notice of a prior act of bankruptcy committed by his debtor. And the notice must be such as to enable him to act immediately. It must be a distinct and definite notice of a specific act of bankruptcy. The party giving it is not to be permitted to give a general notice, and speculate upon being able afterwards to prove some specific act. It may be conceded that this notice would have been sufficient, if the declaration of insolvency had been a complete act of bankruptcy at the time it was made: but here, until something was done upon it, it was a mere piece of waste paper. It might have been revoked before filing. Would a notice that a man was about to execute an assignment of his effects for the benefit of his creditors, be a good notice of a prior act of bankruptcy *by him committed? *649] [CRESWELL, J. Would a notice, that a bill about to become due will probably be dishonoured, be such a notice of dishonour as to charge the drawer? This notice seems to amount to no more than that.] Here, it does not even appear that the plaintiffs ever had notice of the filing of the declaration of insolvency.

TINDAL, C. J. The question in this case turns upon the proper construction to be put on the statute 2 & 3 Vict., c. 29, s. 1, which renders

valid all executions and attachments against the lands and tenements or goods and chattels of the bankrupt, *bond fide* executed or levied before the date and issuing of the fiat, notwithstanding any prior act of bankruptcy, provided the person at whose suit such execution or attachment shall have issued, had not, at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed. The meaning of these words appears to me to be, that the party, in order to defeat an execution, shall have notice of a prior act of bankruptcy complete in itself at the time the notice is given to him. Was this letter of the 2d of April a notice of an act of bankruptcy complete at the time? The act of bankruptcy relied on is one that is created by the sixth section of the 6 G. 4, c. 16, which enacts, that, "if such trader *shall file* in the office of the Lord Chancellor's secretary of bankrupts, a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent or unable to meet his engagements, the said secretary of bankrupts, or his deputy, shall sign a memorandum that such declaration had been filed; which memorandum shall be authority for the printer of the London Gazette, to insert an advertisement of such declaration therein: and every such declaration shall, *after such advertisement* [*650 *inserted as aforesaid*, be an act of bankruptcy committed by such trader at the time when such declaration was filed." Two steps, therefore, are to be taken before the declaration will constitute an act of bankruptcy—the declaration is to be filed with the secretary of bankrupts, and a memorandum is to be signed by him for insertion of the advertisement in the Gazette. Here, the notice simply states that the debtor has signed a declaration of insolvency, and that a fiat has been sent for. All was yet *in fieri*: the party had done something that might or might not become an act of bankruptcy. Putting it at the highest, it merely was calculated to lead the parties to whom the notice was sent, to infer that an act of bankruptcy *would* be committed, provided all proceeded regularly. The bankrupt law does not invalidate the execution, because the creditor has reason to fear that an act of bankruptcy is about to be committed; it does so only where there is notice that an act of bankruptcy actually has been committed. It is very like the case put by my brother CRESSWELL during the argument, of a notice, before a bill becomes due, that it will probably be dishonoured; which no one would, for a moment, contend amounted to a notice of dishonour, so as to charge the drawer for the acceptor's default.(a) I think the rule must be made absolute.

COLTMAN, J. It seems to me to be clear that Nall committed an act of bankruptcy before the levy was made. That, however, would not inva-

(a) The drawer of a bill is presumed to have placed funds in the hands of the drawee. He is not liable to make a *second* provision for the payment, unless the holder elects to resort to him upon default on the part of the drawee. Such an election before the bill was dishonoured would, of course, be nugatory. The object of the legislature in giving effect to a notice of an act of bankruptcy, appears to be, to fix a period for the termination of a struggle for priority amongst creditors. "Notice," however, is the term used in both cases.

*651] validate the execution, *unless the creditor had previously received notice of it. Here, he had not notice that an act of bankruptcy had been committed, but merely that something had been done which would, in all probability, result in an act of bankruptcy. That was not sufficient.

CRESSWELL, J. With respect to the argument urged by my brother *Wilde*—that the notice, to be of any avail, must be a distinct notice of a specific act of bankruptcy—it is to be observed that the notice required by the act is, notice “of any prior act of bankruptcy by him committed;” which, it may be fairly inferred, should be something specific. It is not necessary, however, to decide that here; for, this notice does affect to point to something specific; and that is, that something has been done by the party *tending* to an act of bankruptcy. I do not think an execution-creditor can be called upon in this way to speculate (a) as to whether or not all the necessary steps will be taken to make the declaration of insolvency an act of bankruptcy. I, therefore, agree with my lord and my brother COLTMAN that this rule should be made absolute.

ERLE, J. I also am of opinion that this rule should be made absolute. It is important that the creditor should have such information as will enable him to determine on his right *at the time*. (b) Assuming the contents of the letter to be true, it does no more than intimate to the execution-creditors that it is *highly probable* that the step Nall has taken will result in bankruptcy. (a) That clearly is not such a notice as will deprive them of the benefit of their execution. Rule absolute.

(a) In this case, what remained to be done was, a formal official act, as to which the officer had no discretion, to be followed by the mechanical act of the printer.

(b) See *Doe dem. Elliott v. Hulme*, 3 Mann. & R. 483.

*652] *WALKER v. PETCHELL. May 8.

A. devised to B. in trust, to permit and suffer his wife C. to receive and take the rents and profits for her own use for the term of her natural life; and after her decease, in trust for all and every such one or more of the *child or children* of C., for such estate and interest as she should, by deed or will, appoint; and, in default of appointment, in trust for all and every the *child and children* of C., and, if more than one, equally, and to their several and respective heirs; and in case C. should die *without leaving issue as aforesaid*, then to the heirs of C. for ever:—*Held*, that, by “*issue*,” the testator must be taken to have meant “*children*,” and, consequently, that the limitation over was not too remote.

ASSUMPSIT, upon a feigned issue of *devisavit vel non*. The issue was whether or not the plaintiff, on the 23d of April, 1844, was entitled, under and by virtue of the will of J. S. Walker, her late husband, to an estate in fee simple—subject to be defeated only in the event of her having a legitimate child—of and in certain premises mentioned in the declaration in this cause, being certain real estates situate in Derbyshire, and called the Cuckoo-Stone Dale estate and the Short Butts.

Under an order of ERSKINE, J., the following case was stated for the opinion of the court:—

The plaintiff is the widow of the above-mentioned J. S. Walker, who, before and at the time of his decease, and also at the time of the making and publishing of his last will and testament hereinafter mentioned, was seised in his demesne as of fee of and in, *inter alia*, the premises above mentioned.

J. S. Walker, being seised as aforesaid, on the 14th of December, 1833, duly made and published his last will and testament in writing, duly executed and attested so as to pass real estates by devise; and thereby gave and devised the premises, together with other real, and also personal property, as follows:—

“I give, devise, and bequeath unto Charles Else and Richard Sill, all and every my messuages, cottages, farms, &c., and real and leasehold estates whatsoever, with their *rights, members, and appurtenances; and also all other my money and securities for money, [653] and all other my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, not hereinbefore specifically bequeathed to my said wife, to hold the same unto and to the use of the said Charles Else and Richard Sill, their heirs, executors, administrators, and assigns, upon the trusts and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations thereafter expressed concerning the same, that is to say,” &c., &c.

And the said J. S. Walker, by his said will, and in the subsequent part thereof, after creating certain trusts not material to the present question, declared and directed as follows, (that is to say,) “And, as to all the rest, residue, and remainder of my said real estates, [which residue included and comprised the premises mentioned in the said declaration,] and also as to my said leasehold and personal estates, I direct that they, my said trustees, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall and do stand possessed thereof, and interested therein in trust—from and immediately after my daughter Betsy Walker shall attain her said age of twenty-one years as aforesaid, or, in case of her death before that age, then, from and immediately after that event—to pay unto or permit and suffer my said wife Sarah Walker, or her assigns, to receive and take the rents, issues, profits, interest, and proceeds thereof, as the same shall from time to time become payable, for her own use and benefit, during her life; and, from and immediately after her decease, then that my said trustees, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall and do stand possessed of the same real, leasehold, and personal estates, in trust for all and every *such one or more of the child or children, [654] whether male or female, of her my said wife, lawfully begotten, for such estate and estates, interest and interests, and in such parts, shares, and proportions, manner, and form, and subject to such charges and

payments to any one or more of such child or children, and with and under such restrictions, limitations, and powers, with or without power of revocation, as she my said wife, whether sole or covert, and notwithstanding her coverture, at any time or times during her life, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses, shall direct, limit, or appoint, or give, devise, or bequeath the same; and in default of such direction, limitation, or appointment, gift, devise, or bequest, then *in trust for all and every the child and children of my said wife*, if more than one, in equal shares, as tenants in common, and to their several and respective heirs, executors, administrators, and assigns, for ever. But, in case my said wife shall happen to depart this life *without leaving lawful issue as aforesaid*, then I give, devise, and bequeath, the said residue of my said real estates, [which residue included and comprised the premises mentioned in the said declaration,] and also my said leasehold and personal estates, unto and to the use of the heirs, executors, administrators, and assigns of my said wife, for ever."

J. S. Walker, after making his said will, died seised as aforesaid on the 8th of November, 1833, without having altered or revoked his said will.

Betsy Walker, the testator's daughter, attained the age of sixteen years on the 19th of February, 1844.

*655] The plaintiff, Sarah Walker, is the Sarah Walker mentioned in the will as the wife of the testator.

The question for the opinion of the court is, whether the plaintiff Sarah Walker, on the 23d of April, 1844, was entitled, under and by virtue of the said will of J. S. Walker, to an estate in fee-simple, subject to be defeated only in the event of her having a legitimate child, of and in the premises mentioned in the said declaration, and called respectively the Cuckoo-Stone Dale estate and the Short Butts. If the court are of opinion in the affirmative, then the defendant agrees that a judgment by confession, of 10*l.* damages, or otherwise, as the court may think fit, shall be entered for the plaintiff immediately after the decision of the case: but, if the court are of a contrary opinion, then the plaintiff agrees that a judgment of *nolle prosequi*, or otherwise, as the court may think fit, shall be entered against her immediately after the decision of the case: and, in either event, judgment is to be entered up accordingly.

The case was argued in Michaelmas term last.

Kinglake, Serjt., (with whom was Fitzgerald,) for the plaintiff. The general rule, undoubtedly, is, that the words "dying without leaving lawful issue," unless qualified by other expressions in the will, are to be taken to import an indefinite failure of issue: Jarman on Wills, pp. 418, *et seq.*; *Doe dem. Todd v. Duesbury*, 8 M. & W. 514. Here, however, the

earlier part of the will, and the use of the words of reference "as aforesaid," clearly show the testator's intention to bring this case within the exceptions to that rule, the word "issue" being evidently used to denote "children." The leading authority upon this subject is *Doe dem. Comb-erbach v. Perryn*, 3 T. R. 484. There, "an estate was devised to B., the wife of A., for life, remainder to trustees to preserve, &c., remainder to the children of A. and B., and their heirs, for ever, to be divided among them equally, and, if but one child, to such only child; and his or her heirs, for ever; and, for default of such issue, remainder over; and it was held that the words "for default of such issue," meant "for default of such children." That case is precisely in point; inserting the words "as aforesaid" for "such," they are undistinguishable. BULLER, J., there says: "In the case of *Ives v. Legge*, 3 T. R. 483, n., the words after the first limitation, were 'in default, thereof,' which distinguish it from the present, where the words are, 'for default of such issue,' which mean the same as 'for default of such children.' Then, it was contended that the word 'such' might be rejected. Where, indeed, a word is absurd and nonsensical, and cannot be read in the sense in which it is written, we ought to read it in such a manner as to make it intelligible: but the court cannot reject any word which has sense in the place where it stands. That question was fully discussed in *Denn d. Briddon v. Page and Another*, 3 T. R. 87, n., where the devise was to the son of T. Nash for life, remainder to his first and other sons in tail-male, and, for default of such issue, to the daughters of T. Nash, (without words of limitation,) and, for default of such issue, remainder over: there it was contended that the word *such* ought to be rejected, and then the daughters would take an estate-tail: but the answer given by the court was, that they could not say that *such* had no meaning, for, *daughters* were before named, to whom *such* was referable; and it was held that the daughters only took an estate for life. So, here, the words 'such issue,' are sensible if they mean *children*; and, therefore, the court cannot reject either of them." "The same doctrine is laid down in *The King v. The Marquess of Stafford*, 7 East, 521. In *Crump d. Woolley v. Norwood*, 7 Taunt. 362, the testator devised gavelkind land to his three nephews, sons of his brother John, during their lives, in common, and, after their respective decease, the part and share of him or them so dying, unto the heirs lawfully issuing of his and their body and bodies respectively, and, if but one, to such only one, and to his, her, or their heirs; and, if any of his nephews should die without such issue, or, leaving any such, they all should die without attaining twenty-one, then the share of him and them so dying, unto the survivor and survivors of his said nephews, and the heirs of the body of such surviving and other nephew, equally in common; and, for want or in default of such issue of his nephews, unto his own right heirs: and it was held that this was not an executory devise, but a contingency with a double aspect. There is no

inconsistency in construing this as two contingent remainders, or, as is called, a contingent remainder with a double aspect. For instance, here, if the widow should leave children, they would take the remainder in fee; if none, the tenant for life would take the remainder in fee. In *Fearne's Contingent Remainders*, 9th edit. p. 373, the rule is thus laid down: "Although a fee cannot, in conveyances at common law, be mounted on a fee; yet two or more several contingent fees may be limited, merely as substitutes or alternatives one for the other, and not to interfere, but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect. Thus, in *Luddington v. Kima*, 1 Ld. Raym. 208, it was held that the first remainder was a contingent remainder in fee to the use of A., and the remainder to B. was also a contingent fee, not
 *658] contrary to, or in any degree derogatory from the effect of, the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. For, if A. had issue male, the remainder was to vest in that issue in fee; but, if A. had no issue male, then it was to vest in B. in fee; and these were limitations of which the one was not expectant upon, and to take effect after the other; but were contemporary, to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed. That is precisely the character of the estate here. In *Doe d. Herbert v. Selby*, 2 B. & C. 926, 4 D. & R. 608, the testator devised to his "son G. for life, and, from and after his decease, unto all and every the child and children of G. lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint-tenants; but, if my son G. should die without issue, or, leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my son T., my daughter A. S., and my brother-in-law W. D., and to their heirs for ever, as tenants in common, and not as joint-tenants." After the testator's death, G. suffered a recovery, and died unmarried and without issue. It was held, that, in that event, the devise over must take effect as a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery. In *Doe d. Todd v. Duesbury*, 8 M. & W. 514, "issue" was construed to mean issue generally, without reference to any parties previously named in the will. That case, therefore, has no application here.

Channell, Serjt., (with whom was *Willes*,) for the defendant. The
 *659] devise over in this case is an executory devise, to take effect on an indefinite failure of issue, and therefore bad, as being too remote. This is not to be distinguished from the case of *Doe d. Todd v. Duesbury*, unless the words of reference "as aforesaid" have the operation that is contended for on the part of the plaintiff. There, the testator devised to T. D. and his assigns during his natural life, and, from and

after his decease, unto all and every his child and children; if only one child, then to such child, his or her heirs, executors, administrators, or assigns; but, if more such children, then equally to be divided amongst them share and share alike, and to the heirs, executors, administrators, and assigns of such children respectively, as tenants in common, and not as joint-tenants; but, in case the said T. D. should happen to die without leaving lawful issue, then to R. T., E. D., and M. D., and to their heirs, executors, administrators, and assigns, as tenants in common, and not as joint-tenants, charged with the payment of 1000*l.* in that case given and bequeathed to E. H., to be paid to her at the end of twelve months after the said R. T., E. D., and M. D., their heirs, &c., should come into the possession of the same premises. At the time of the testator's death, T. D. and several of his children were living: and it was held, that the limitation over to R. T., E. D., and M. D., did not operate by way of executory devise, or vest in them a remainder in fee. The elaborate judgment delivered by ROLFE, B., in that case, tends very much to narrow the preceding decisions and loose *dicta* upon this subject. Where the words used are "such issue," and the issue immediately preceding are evidently intended, it may be conceded that the word "such" has the effect of cutting down or restraining the general meaning the expression *prima facie* bears. Looking, however, at the preceding passages of this will, it is quite manifest "that "issue" was not meant to be confined to *children* living at the death. [*660

Kinglake, Serjt., was heard in reply.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

The question before us in this case arises upon the will of J. S. Walker, whereby he devised all his real estate to trustees and their heirs, to the use of them and their heirs, upon trust, as to the premises mentioned in the special case, (after a particular devise, upon which no question arises,) to permit and suffer his wife Sarah (the plaintiff) to receive the rents and profits for her own use, for the term of her natural life; and, after her decease, in trust for all and every or such one or more of her child or children, for such estates and interests, as she should by deed or will appoint; and in default of appointment, in trust for the children of his wife, if more than one, equally, and to their several and respective heirs: but in case his said wife should die without leaving issue *as aforesaid*, then he devised his said real estate unto and to the use of the heirs of his said wife for ever.

As the trustees took the legal estate under this devise, we have been placed in some difficulty, by reason of the established rule of the courts of Westminster Hall, as to giving our opinion on a question which relates to a purely equitable estate: and it is only in consequence of the urgency of the counsel on both sides, and their consent that the case should be considered as if actually amended by stating a devise of the legal estates

to the devisees, of the same quantity as those given to them in the equity, that we proceed to give our judgment herein.

*661] *The question stated in this special case for our consideration is, whether Sarah Walker (the plaintiff) is entitled to an estate in fee-simple, subject to be defeated only in the event of her having a child: and the whole argument before us has proceeded upon the question whether the event upon which the limitation of the remainder in fee to Sarah Walker depends, is or is not too remote; it being conceded on both sides, that, if that limitation depends on the indefinite failure of issue in Sarah Walker, it will be void, as being too remote; whereas, if it depends on her dying without leaving issue at the time of her death, it will be a good limitation.

The general rule of construction of wills, as established by a long course of decided cases, is, that the words "dying without leaving issue," unless they are qualified and controlled by other words in the context, must be taken to refer to an indefinite failure of issue, and that any executory devise over, which is made to depend on the general failure of the issue, is void, on the ground of its being too remote. The point to be considered, therefore, is, whether the testator has shown, upon the face of the will, an intention that those words should receive a more limited and qualified construction.

The testator gives by his will an estate for life to his widow, with a contingent remainder in fee to her children, in case she has any; and immediately afterwards proceeds to make the provision in question, "in case she should die without leaving lawful issue as aforesaid." We think those words of reference "as aforesaid" do manifestly show the intention of the testator that the general word "issue" should be construed to mean "children;" for, the words "as aforesaid" must necessarily refer to some description of issue which had been already mentioned in the will; and, *662] as the only mention in the will of any issue of the wife has been the mention of the children of the wife, we think the necessary inference is, that the testator by the word "issue" meant "children," and that the limitation over depends on the wife dying without leaving children; and, consequently, there can be no objection to it on the ground of remoteness.

It may not, perhaps, be altogether correct to state the question in the precise form in which it has been stated in this case, namely, whether the wife took an estate in fee-simple, subject to be defeated *only* in the event of her having a child; for, before the wife has any child, the remainder to the children, and the remainder over to the wife in fee, would seem to be contingent remainders; and, consequently, the estate of the wife would not only be liable to be defeated by the vesting of that remainder, but also by any act of the tenant of the particular estate which would defeat a contingent remainder; (a) and, after a child is born, the devise over to

(a) No act of the tenant of the particular estate could now affect the contingent remainder. See 8 & 9 Vict. c. 106, s. 6.

the wife in fee would then be an executory devise, according to the doctrine laid down in the case of *Doe d. Herbert v. Selby*, 2 B. & C. 926, 4 D. & R. 608, which, in its facts, very much resembles the present. This consideration, however, does not effect the determination of this case.

Upon the grounds we have stated, we give judgment for the plaintiff for 10l., according to what we were given to understand, in the course of the argument, was intended to be the agreement between the parties.

Judgment for the plaintiff.(a)

(a) The 8 & 9 Vict. c. 106, s. 6, protects legal contingent remainders against the acts and defaults of preceding takers. Equitable contingent remainders were safe before, and could at no time be defeated by a party who took a prior legal freehold estate, or a prior equitable interest, commensurate, in point of duration, with a freehold estate. (Fearn, Cont. Rem. 8th ed. 321.) Here, (supra, 660,) "the trustees," i. e. the devisees Elise and Sill, "took the legal estate," i. e. the legal fee. The estate of Sarah Walker was therefore merely equitable, and would not be liable to be defeated,—as assumed (supra, 663)—"by any act of the tenant of the particular estate which would defeat a contingent remainder."

The case was to be considered as amended by stating a devise of legal estates of the same quality as those given in equity, supra, 660;) but this was for the purpose of enabling a court of law to deal with the question, not of substituting destructible for indestructible remainders.

With regard to the words "as aforesaid," it may be observed that even if the expression used had been "and in case she shall die without issue," ("not such issue,") the words "without issue" must have been construed to mean "without any child or children," or, in other words, "without any object or objects of the preceding limitation." (*Goodright v. Dunham*, 1 Dougl. 264; *Malcolm v. Taylor*, 2 Russ. & Mylne, 416.) If the words "without issue" can receive no other construction, the words "without leaving issue" must, *a fortiori*, be restrictive; the latter words having, in devises of realty, been wrested from their natural import, (*Dansey v. Griffiths*, 4 M. & S. 61;) although in bequests of personalty, even when blended with realty, they are allowed to retain that import.

It is said (supra, 661) to have been "conceded on both sides, that if the limitation of the remainder in fee to Sarah Walker depended on the indefinite failure of issue of Sarah Walker, it would be void as too remote." It may be doubted whether that objection could ever apply to a limitation by devise of real estate, on a dying, without issue, of the previous taker of an estate of freehold. If the failure of issue contemplated be an indefinite failure of issue, will not the previous taker, if there be no mesne limitation, be tenant in tail in possession, and if there be a mesne limitation, tenant in tail in remainder? In all cases of this description the contest appears to have been—whether the words contemplating a failure of issue should create an estate-tail by implication, or should be simply referred to the previous limitations; that is to say, whether the limitation introduced by these words was more remote or was less remote—in what manner the limitation took effect, not whether it was too remote, and therefore incapable of taking effect.

The judgment states the question for consideration to be "whether Sarah Walker was entitled to an estate in fee-simple, subject to be defeated only in the event of her leaving a child," and that "the whole argument has proceeded upon the question whether the event upon which the limitation of the remainder in fee to Sarah Walker depends, is or is not too remote?" But on looking at the special case, it is difficult to see that any such question could arise, or that any such remainder had been created.

The devise was, unto, and to the use of, Elise and Sill, their heirs, &c., upon trust to pay unto or permit Sarah Walker to receive the rents for life, and, after her death, for her children as she should appoint, and in default of appointment, for her children in fee: then follows, in these words, the limitation said to be a remainder, "but in case my said wife shall happen to depart this life without leaving lawful issue as aforesaid, then I devise the residue of my said real estate unto and to the use of the heirs and assigns of my said wife for ever." So that there was a legal executory devise to the heirs of the wife, in defeasance of the legal fee primarily devised to the trustees; and if the benefit of this executory devise attached in the wife, it must have so attached under the rule in *Shelley's* case, (as to which rule see 2 Mann. & Ryl. 490, (c) 492 (a), (c); 1 N. & M. 657 (g); 7 M. & G. 941;) but how could any question as to the applicability of that rule arise, unless the wife took, which clearly she did not, a prior estate of freehold of the same legal quality as that of the estate of inheritance devised to her heirs; and how, from the very origin and nature of the rule could it be applicable to an executory limita-

tion to those heirs? But, assuming it to have been applicable, then the wife took, not a remainder in fee, but an executory fee.

The only question really arising upon the limitations contained in this will seems to be this—whether the word “having” operated so as to render the trust-limitation in favour of the children liable to fail in the event of Sarah Walker’s not leaving a child living at her death, or whether, on the contrary, this word “having” ought to be construed in the sense of “having had,” so as to give the children absolutely vested interests in these limitations. (See *Prest. Est.* 371, et seq.; *Fearne, Cont. Rem.* by Butler, 8th ed., 52; *Doe dem. Bean v. Halley*, 8 T. R. 5; *Parr v. Swindell*, 4 Russ. 283; *Jarman on Wills*, 377.) But this point does not appear to have been considered.

The rule of construction proposed by the recent statute of wills (7 W. 4, and 1 Vict., c. 26, s. 29) disposes, as regards testamentary dispositions made since the 31st of December, 1838, of some of the questions to which the words “dying without issue” and “dying without leaving issue,” have, from time to time, given rise, substituting matter for other questions which may not perhaps be found to be more easy of solution.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
UPON WRITS OF ERROR FROM THAT COURT
TO THE
EXCHEQUER CHAMBER,
IN
Trinity Term,
IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term were,

TINDAL, C. J.

MAULE, J.

COLTMAN, J.

CRESWELL, J.

TOMLINSON, Clerk, v. Sir F. BOUGHEY, Bart., and Another.

May 23.

Where, in proceedings before a tithe-commissioner under the forty-fifth section of the 6 & 7 W. 4, c. 71, several moduses are set up in respect of distinct farms, and the annual value of the payment to be made in respect of each farm is less than 20*l.*, his decision is final, notwithstanding the whole is in the hands of the same proprietor, and the aggregate yearly value exceeds 20*l.*

THE 44th section of the tithe-commutation act, 6 & 7 W. 4, c. 71, enacts, “ that if any modus or composition-real, or prescriptive or customary payment, *shall be payable instead of the tithes of any of the lands, or produce thereof, in the parish, the commissioners or assistant commissioners shall, in such case, estimate the amount of such modus, composition, or payment, as the value of the tithes payable in respect of such lands or produce respectively, and shall add the amount thereof to

[*664

the value of the other tithes of the parish ascertained as aforesaid, and shall also make due allowance for all exemptions from, or non-liability to, tithes of any lands, or any part of the produce of such lands: provided also, that, if it shall appear to the said commissioners or assistant-commissioner that any question concerning any modus or composition-real, prescriptive or customary payment, or claim of exemption from or non-liability to the payment of tithes, relating to the lands in question, shall have been decided by competent authority before the making of the award, the commissioners or assistant-commissioner shall act on the principle established by such decision, and shall make their award as if such decision had been made at the beginning of the said period of seven years."

Section 45 enacts, "that, if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition-real, or prescriptive or customary payment, or any claim of exemption from, or non-liability under any circumstances, to, the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the commissioners or assistant-commissioner shall be hindered, it shall be lawful for the commissioners or assistant-commissioner to appoint a time and place in or near the parish for hearing and determining the same; and the decision of the commissioners or assistant-commissioner shall be final and conclusive on all persons, subject to the provisions hereinafter contained."

*665] *And section 46 provides, "that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant-commissioner, may, *if the yearly value of the payment to be made, or withheld, according to such decision, shall exceed the sum of 20l.*, cause an action to be brought in any of his majesty's courts of law at Westminster, against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant-commissioner shall direct, to the parties interested therein, or to their known agents; in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried, and shall proceed to a trial at law of such issue at the sittings after the term or at the assizes then next or next but one after such action shall have been commenced, to be holden for the county within which such lands, or the greater part thereof, are situated; with liberty, nevertheless, for the court in which the same shall have been commenced, or any judge of his majesty's courts of law at Westminster, to extend the time for going to trial therein, or to direct the trial to be had in another county, if it shall seem fit to such court or judge so to do; and every defendant in any such action shall enter an appearance

thereto, and accept such issue; but in case the parties shall differ as to the form of such issue, or in case the defendant shall fail to enter such appearance or accept such issue, then the same shall be settled under the direction of the court in which the action shall be brought, or by any judge of his majesty's courts of law at Westminster, and the plaintiff may proceed thereon in like manner as if the defendant had appeared and accepted such issue," &c.

The plaintiff in this case was the rector of the parish of Stoke-upon-Trent, in the county of Stafford. The *defendants were owners of lands within the parish. Proceedings being taken before an assistant tithe-commissioner under the statute 6 & 7 W. 4, c. 71, and the defendants having set up fourteen several moduses, one, a parochial modus, and the rest, farm moduses, nine of them (including the claim of a parochial modus) were determined in favour of the land-owners, and the other five in favour of the rector. The yearly value of the lands respectively covered by these alleged moduses was more than 20*l.*, but the yearly value of the tithes in each case was less than 20*l.*, except in one case, where it was stated to be "about 20*l.*"

The rector, being dissatisfied with the decision of the commissioner, commenced the present action, in order to try his right pursuant to the provisions of section 46 of the act, tendering an issue as to the existence of each modus upon which the assistant-commissioner had decided against him. The defendants having refused to accept such issue,

Channell, Serjt., on behalf of the rector, in Easter term last, obtained a rule calling upon the defendants to show cause why they should not accept the issue, or why the same should not be settled under the direction of the court, insisting that the case was within the act, if the aggregate yearly value of all the tithes covered by the several moduses exceeded 20*l.*

Talfourd and *Shee*, Serjts., now showed cause. By the 45th section of the act the decision of the commissioners or assistant-commissioner is declared to be final and conclusive on all persons, subject to the provisions contained in section 46. Now, the 46th section provides "that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioner or *assistant-commissioner, may, if the yearly value of the payment to be made or withholden according to such decision shall exceed the sum of 20*l.*, cause an action to be brought in any of his majesty's courts of law at Westminster against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant-commissioner shall direct, to the parties interested therein, or to their known agents; in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried," &c. The clause then proceeds to regulate the time and mode of trial of such issue. The question is, whether, there being several distinct

moduses set up in respect of several farms, the circumstance of the same parties being interested in all, entitles the rector to an issue under this clause, because the aggregate yearly value of the several payments to be made or withheld exceeds 20*l.*, each separate claim to a modus involving a yearly value of less than that sum. The intention of the legislature evidently was, to make the decision of the commissioner final in all cases save where the yearly value of the payment to be made or withheld according to such decision should exceed 20*l.*—to prevent the whole value of the matter in dispute being absorbed by an extensive course of litigation. Had the several farms in this case belonged to different proprietors, it is quite clear the rector would not have been entitled to an issue. Nor can he be so entitled by reason of the accidental circumstance of the same parties being proprietors of the whole. Besides, assuming that the rector had a right to an issue by reason of the aggregate yearly value of the tithes submitted for the decision of the commissioners exceeding 20*l.*, he has clearly no right to adopt so much of the decision as is in his own *668] favour, and *dispute the rest. In the case of *Flanders v. Bunbury*,^(a) which was one of a series of actions brought by the owners of lands against the rector and vicar respectively of Mildenhall, in Suffolk, by way of appeal against the award of an assistant-commissioner under the act now in question—the yearly value of the tithe in question in that action being only 2*l.*, but the aggregate yearly value of the tithes covered by the award, and the decision as to which was excepted to by the other parties, exceeding 20*l.*—the court of Queen's Bench made absolute a rule to stay the proceedings.

Channell, Serjt., in support of his rule. In *Mackintosh v. New College*,^(b) the court said that the object of the provision now under discussion was, to give to parties dissatisfied with the decision of the commissioner an opportunity to try their rights before a jury. To entitle them so to do, the statute requires that their interests shall be interfered with to a given amount. Here, the rector appears before the commissioner, standing upon his common-law right: his claim is met by the land-owners, who set up several moduses: the commissioner thereupon decides that the rector's claim is not well founded in respect of certain farms. [CRESSWELL, J. Do you contend that the rector would be entitled to an issue, if the lands in respect of which the moduses are established by the award were in the hands of different persons?] It is necessary to carry the argument to that extent, in order to sustain this rule. [MAULE, J. The question turns upon the meaning of the words "such decision" in section 46.] The subject-matter of the decision here, exceeds 20*l.* [MAULE, J. The 45th section empowers the commissioner to decide *669] upon "any question (amongst others) as to the existence of any modus or composition-real." The decision, therefore, is to be upon a question as to some modus. Suppose two several moduses are

(a) Easter term, 1843, not reported.

(b) In the Court of Queen's Bench, not reported.

set up, does it make any difference, as to the right to appeal, whether the rector chooses to dispute both, or only one?] The case might possibly have been different, had the several lands as to which the several moduses are set up belonged to different owners: there might then have been a want of mutuality, seeing that each would not be affected in interest to the extent of 20*l*. If the land-owners might have made themselves plaintiffs as to the four moduses that were decided against them, the issue may be modified so as to introduce them; but the rector was not to assume that they were dissatisfied with the decision as to those moduses.

TINDAL, C. J. It appears to me that this case falls within the restriction imposed by the legislature in the forty-sixth section of the act for the commutation of tithes. The words of that section are: "Provided always that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant-commissioner, may, if the yearly value of the payment to be made, or withholden, according to such decision, shall exceed the sum of 20*l*., cause an action to be brought in any of his majesty's courts of law at Westminster against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant-commissioner shall direct, to the parties interested therein, or to their known agents, in which action the plaintiff shall deliver a feigned issue, whereby such *disputed [*670 right may be tried," &c. The party dissatisfied with the decision of the commissioner, therefore, is restrained from appealing against it, unless the yearly value of the payment in dispute exceed 20*l*. And the question before us is, whether, where several farms, each of which is covered by a separate modus, and the value of the payment to be made in respect of each of which is less than 20*l*., belong to the same owner, the rector is at liberty to combine them so as to make the aggregate amount exceed the value required to entitle him to an issue. It seems to me that each modus is the subject of a separate decision by the commissioner, and of a distinct issue, provided it be of the requisite value. It has been contended on behalf of the rector, that, even if the several farms are in the hands of different owners, he still has the right to an issue under the act, if the aggregate yearly value of the whole exceeds 20*l*. That argument, however, is open to this answer, that the rector and the land-owner would not be upon an equal footing, as the legislature intended they should be; for, each land-owner would be precluded from tendering an issue, by reason of the inferior value of the payment in dispute. Taking the forty-fourth, forty-fifth, and forty-sixth sections together, it is clear that a modus is put as a distinct subject-matter of decision by the commissioner; and that, if either party is dissatisfied with his decision, in one case only is an issue to go, namely, if the yearly value of the payment to

be made or withholden *according to such decision* shall exceed the sum of 20*l.* Here, the value in each case fell short of 20*l.*; and it seems to me that the circumstance of the several farms being in the hands of the same proprietors is a mere accident which cannot, in any degree, vary the rights of the rector. I, therefore, think the rule should be discharged

*671] *COLTMAN, J. Though put together by the commissioner, the decision as to each modus is a separate decision. The case, therefore, is clearly within the prohibition of the act.

MAULE, J. The rector is only entitled to an issue where the yearly value of the tithes withholden, or of the modus, exceeds 20*l.* Unless that be the case, the decision of the commissioner is made final by sect. 45. In this case several moduses were set up before the commissioner in respect of different farms, quite unconnected the one with the others. I think that constituted a number of questions with respect to those several moduses. The commissioner might have decided one of the moduses to be good, and all the rest bad; and in each case his decision would have been a decision upon a question as to the existence of a modus. Whether there are a number of decisions or not, depends upon whether or not there are a number of questions. The statute seems to me to be very clear in its terms; and the policy of it is evident—that the contending parties shall not be permitted to incur the expense of an action in the ordinary course, where the subject-matter of the decision is of a less yearly value than 20*l.* My brother *Channell* has contended that the rector might claim an issue against each and all of the land-owners, supposing each farm to belong to a different proprietor, provided the aggregate yearly value exceeded 20*l.* If that were so, the rector might put an individual to the expense of trying an issue touching a single field, the yearly value of the tithe of which might be only 1*s.* That clearly cannot be the true construction of the act. For these reasons, I am of opinion that the present case is within the prohibition.

*672] *CRESSWELL, J. I am also of opinion that there are as many disputes and questions as there are moduses. The forty-sixth section applies to each separate decision upon each dispute contemplated by the preceding clause. Rule discharged, without costs.

COOPER v. WILLOMATT. May 23.

A bailor of goods for hire, by selling them, determines the bailment, and the bailor may maintain trover against the purchaser, though the purchase was *bonâ fide*.

A. conveyed goods by bill of sale to B. B. allowed A. to use the goods at a weekly rent, A. undertaking to deliver them up on demand. A. afterwards sold and delivered the goods to C., a *bonâ fide* purchaser:—*Held*, that B. might maintain trover against C.

TROVER, for household furniture. Pleas, not guilty, and not possessed.

The cause was tried before ERLE, J., at the sittings at Westminster after last Hilary term, when the following facts appeared in evidence:—

On the 24th of April, 1844, the goods in question were conveyed to the plaintiff under a bill of sale by one Parry Savage, in consideration of 100*l.* advanced to him by the plaintiff: and on the same day the following agreement was entered into between the parties:—

“Whereas the said Parry Savage having, by bill of sale bearing date the 24th of April, 1844, bargained, sold, and absolutely assigned unto the said Edward Cooper all his household furniture, goods, chattels, utensils, things, and effects mentioned and set out in an inventory or schedule to the said bill of sale; and whereas the said Edward Cooper has, by virtue of the powers contained in the said bill of sale, possessed himself of the said household furniture, goods, chattels, utensils, things, and effects; and whereas the said Parry Savage proposed to the said Edward Cooper to rent or hire of him the said Edward Cooper the said household *goods, furniture, chattels, utensils, things, and effects, [¶673 and the said Edward Cooper having consented and agreed to let the same to hire, at and after the rent or sum of 6*s.* by the week, to be paid to him the said Edward Cooper for the rent or hire thereof: It is hereby agreed between the said parties, that the said Parry Savage shall have the use of the said household furniture, goods, chattels, utensils, things, and effects, he the said Parry Savage paying unto the said Edward Cooper the rent or sum of 6*s.* by the week for the rent or hire of the same; the first weekly payment to become due and be made by the said Parry Savage, on the 27th day of April instant: and the said Parry Savage hereby agrees to pay the said rent or sum of 6*s.* by the week, during so long a time as he shall be allowed by the said Edward Cooper to have the use of the said household furniture, goods, chattels, utensils, things, and effects: and the said Parry Savage hereby agrees that he will not alter, or dispose of, the same, or any part thereof, without the license or consent of the said Edward Cooper, his executors, administrators, or assigns, for such purpose had and obtained, in writing; and that he will pay for, or replace, such articles or things as may be broken or damaged; and that he will deliver up the said household furniture, goods, chattels, utensils, things, and effects, in as good state and condition as they now are, on demand being made for the same by the said Edward Cooper, his executors, administrators, or assigns; and his or their agent or agents shall be at liberty at any time, without first bringing any action for recovery of the said goods and chattels, to enter the house and premises of the said Parry Savage, or such other place at which the said goods may be deposited, for the purpose of removing the said household furniture, goods, chattels, utensils, things, and effects, without being subject to any action of trespass, or any other action.”

*On the same day, the plaintiff addressed the following letter [¶674 of authority to the wife of Parry Savage:—

"To Mrs. Betsy Savage.

"24th April, 1844.

"I hereby request you to hold possession, for me and on my behalf, of all the household furniture, goods, chattels, utensils, things, and effects mentioned and set out in the inventory or schedule to the bill of sale of this date, by which Parry Savage has bargained, sold, and assigned to me all the said household furniture, goods, chattels, utensils, things, and effects herein mentioned, a copy of which inventory is hereunto annexed: and the said Edward Cooper hereby requires you not to allow the said Parry Savage to alter or dispose of the same, or any part thereof, without my license and consent in writing having been first obtained for that purpose."

Mrs. Savage signed a memorandum endorsed upon this document, accepting the trust, and undertaking to perform it.

Savage shortly afterwards removed the goods, and sold them to the defendant, a furniture-broker, who bought them in the *bona fide* belief that they were the property of Savage. The plaintiff demanded the goods of the defendant, and, on his refusal to restore them, the present action was brought.

The learned judge nonsuited the plaintiff, reserving to him leave to enter a verdict for 75*l.*, the agreed value of the goods, if the court should be of opinion that, under the circumstances, trover was maintainable.

Shee, Serjt., in Easter term, obtained a rule nisi accordingly. He submitted that the effect of the agreement of the 24th of April, 1844, and of the contemporaneous letters, was, not to create an actual demise of *675] the "goods to Savage—the goods being still in the possession of the plaintiff through his agent (a) Mrs. Savage, but to give Savage the mere use of them, determinable at the plaintiff's pleasure—the lowest interest known to the law—*Christie v. Lewis*, 2 Brod. & B. 410, 5 J. B. Moore, 211; *Saville v. Champion*, 2 B. & Ald. 503; *Tate v. Meek*, 8 Taunt. 280, 2 J. B. Moore, 278; *Dean v. Hogg*, 10 Bingh. 345, 4 M. & Scott, 180: and that, even assuming a tenancy to have been created by the agreement, it was determined by the conduct of Savage in dealing with the goods in a manner that was inconsistent with its continuance—*Gordon v. Harper*, 7 T. R. 9, post, 699; *Loeschman v. Mackin*, 2 Stark. N. P. C. 311; *Payne v. Whittaker*, R. & M. 99; *Higgon v. Mortimer*, 6 C. & P. 616.

Talfourd, Serjt., (with whom was *Butt*.) now showed cause. The question is, whether the relation of landlord and tenant between Cooper and Savage was so put an end to by the conduct of the latter, as to enable Cooper to maintain trover. The distinction between that form of action, and case for an injury to the plaintiff's reversionary interest, is pointed out in *Gordon v. Harper*. There, it was held, that, where goods (furniture) leased with a house, have been wrongfully taken in execution

(a) *Quere*, as to the effect of a receipt by a wife of goods from her husband on behalf of others, and as to her capacity to deal with him as the agent of others.

by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease; because, to maintain such an action, he must have, at the time, the right of possession, as well as the right of property. The agreement of the 24th of April operated as a demise of the furniture and effects at a weekly rent, determinable by a week's notice, or, at all events, only by a demand; and none appears to have been made. [MAULE, J. I *doubt whether a demand on the defendant, who claims under Savage, would not be a sufficient demand to revest the goods in the plaintiff. TINDAL, C. J., referred to Litt. a. 72, where it is said: "If I lend to one my sheep, to tathe his land, or my oxen, to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending." This is the case of a mere bailee. *Gregg v. Wells*, 10 Ad. & E. 90, 2 P. & D. 296, is exactly in point. There, the plaintiff, who was the owner of the goodwill and fixtures of a public house, allowed A. B. to represent himself as such, to the landlords, and the latter thereupon let the public-house to A. B., and A. B. sold the lease and fixtures to the defendant, who was informed by the landlords that A. B. was their tenant; and it was held that the plaintiff had estopped himself from recovering the fixtures from the defendant, who had purchased *bonâ fide*. So, here, the plaintiff, having, by his conduct, authenticated Savage as the owner of the goods, is estopped from asserting his title to them against a *bonâ fide* purchaser. [MAULE, J. The transaction between Cooper and Savage would have been fraudulent as against creditors, under the 13 Eliz. c. 5, and also within the 27 Eliz. c. 4. But the latter act applies only to lands: the legislature seems to have thought *caveat emptor* to be the rule as applied to goods.] The case of *Loeschman v. Machin* is not a very cogent authority. [MAULE, J. Where a man acts *ex mandato*, if he exceeds his authority, he is a wrongdoer altogether: so, if he hires a horse, and kills or sells him; or, if a carrier breaks open a package that is intrusted to him. "Demise" is an improper term as applied to a personal chattel: it is rather a *license* to use it. The real question here is, whether or not the plaintiff could have maintained trover against Savage.] *He might have brought *assumpsit* on the agreement. If tenant for years makes a feoffment, he forfeits his interest: but, if he conveys by lease and release, it works no forfeiture, but operates only to the extent of the estate he has. In Comyns's Digest, *Forfeiture*, (A. 3,) it is said, that, "Generally, an alienation by a particular tenant is no forfeiture, if the reversion or remainder is not thereby divested: and therefore, if tenant for life, or years, of an advowson, rent, common, or other thing which lies in grant, by deed grants his estate to another *in fee*, it is no forfeiture. Co. Litt. 251 b: 1 Roll. 854, l. 9, 12. So, if a man in remainder or reversion for life, of lands, &c., grants his estate by deed to another *in fee*, it is no forfeiture: Co. Litt. 251 b: 1 Roll. 854, l. 11. So, if *cestuy que use* for life, before the statute 27 H. 8, c. 10, had made a feoffment, it was

the mill, and formed part of the inheritance, and, when wrongfully severed, became the property of the reversioner." In *Higgon v. Mortimer*, PARKE, B., appears to have ruled, that, if a tenant of a farm remove part
 *681] of the soil, the landlord may maintain (a) either *trespass *de bonis asportatis*, or trover, for such removal. In Story on Bailments, ch. vi. § 396, it is said: "It has been decided, that, where a thing, as, for instance, a horse, is let to hire for a particular object or journey, and the hirer wrongfully use it for another object or journey, there the owner has no right to retake it by force. (b) But it seems that such a misuser amounts to a virtual determination of the bailment, and destroys the hirer's special property therein; and the owner may maintain trover therefor." (c) [MAULE, J. That seems rather inconsistent. (d)] The same learned author, in a former chapter, says: (e) "If a bailee delivers the goods to a second bailee, the first bailee may demand and recover the same from the second bailee, because the latter hath the possession of the former, and undertakes for the custody. But the original bailor may also demand and recover the same from either bailee; because he has the property, and both are bound to answer him." For this he cites *Isaack v. Clark*, 2 Bulstr. 306, where DODDERIDGE, J., says: "So long as the privity of the bailment remains, no action of trespass lieth: and so is 2 E. 4, fol. 5: (g) but, where the same is determined by the tortious act of the defendant, there this shall make a conversion, and an action upon the case well lieth: 12 E. 4, fo. 8. (h) If a man delivers to another a horse to ride to York, if he rides on him to Carlisle, an action well
 *682] lieth; (i) the reason *is, because that he, by his wrongful act, hath now destroyed the privity of the first bailment, by doing contrary unto it. With this agrees 2 H. 7, fo. 11; (k) 18 E. 4, fo. 23; (l) 21 E. 4, fo. 76 b; (m) 12 E. 4, fo. 13 a; *The Lord Versey's case*, 28 H. 8, Dyer, fo. 22; 5 H. 7, fo. 16; (n) 27 H. 8, fo. 27; (o) and 21 E. 4, fo. 19 a (p) and 80 b." (q) The case is clearly distinguishable from *Gregg v. Wells*. Here Savage was intrusted with the goods to no greater extent than a bailee is ordinarily intrusted.

TINDAL, C. J. It appears to me, that, if the transaction between Cooper and Savage is assumed (as perhaps it may be) to be a demise of the goods to the latter, it is such a demise as might at any time be put

(a) 6 C. & P. 616. *Tamen, quære*, unless there be a distinct asportation at a time subsequent to that of the act of severance from the freehold.

(b) Citing *Lee v. Atkinson*, Yelv. 172, 1 Brownl. R. 217.

(c) Citing *Wilkinson v. King*, 2 Campb. 335; *Loeschman v. Martin*, 2 Stark. N. P. C. 311, *Youle v. Harbottle*, Peake, N. P. C. 49, 2 Wms. Saund. 47 f, and notes of Williams and Paterson; *Powle v. Sadler*, Paley on Agency, by Lloyd, 80; 2 Salk. 655.

(d) But Story adds—"so that there would not seem to be any sound objection to the owner's retaking the horse, if he could, peaceably and without personal violence."

(e) Ch. II. § 105. (g) P. 2 E. 4, fo. 4, 5, pl. 9.

(h) P. 12 E. 4, fo. 8, pl. 20.

(i) Ib. and H. 18 E. 4, fo. 23, pl. 5.

(k) H. 2 H. 7, fo. 11, pl. 9.

(l) H. 18 E. 4, fo. 23, pl. 5.

(m) *Pond's case*, H. 21 E. 4, fo. 78.

(n) M. 12 E. 4, fo. 13, pl. 10.

(o) H. 5 H. 7, fo. 10, 11, pl. 2.

(p) H. 21 E. 4, fo. 19, pl. 22.

(q) *Quære*, as to this last reference

an end to at the will of the former. And it seems to me, that, if Savage put the goods into the possession of another, meaning to give to that other a larger interest in them than he himself possessed, he must, at all events, be held to have parted with the limited interest he did possess. The demand upon the defendant, therefore, as much put an end to the tenancy of Savage as if the demand had been made upon Savage himself. But, supposing the tenancy not to have been determined, I cannot get over the authority of *Loeschman v. Machin*. There, the hirer of certain pianos having sent them to the defendant, an auctioneer, for sale: in an action against the auctioneer, *ABBOTT, J.*, ruled that, "if goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion; and that, if the *auctioneer afterwards refuse to deliver them to the owner, un- [•683 less he will pay a sum of money which he claims, he is also guilty of a conversion." That is a position I am not prepared to dispute. I therefore think the rule for entering a verdict for the plaintiff in this case must be made absolute.

COLTMAN, J. It seems to me also that the case of *Loeschman v. Machin* is a satisfactory authority for us to act upon. *Isaack v. Clark* is likewise very applicable to the present case.

MAULE, J. I do not think we are called upon, by any of the authorities that have been cited, to hold that this action is not maintainable. *Loeschman v. Machin* is not, in my judgment, to be distinguished from this case: and it has been approved of in subsequent cases. If, however, there were no authority to support our view, I should still come to the same decision. It occurred to me, in the course of the argument, that Savage might still be liable to the weekly rent of 6s., notwithstanding the recovery of the value of the goods by the plaintiff in this action. That may be so: but still I do not think it by any means shows that the plaintiff may not set up the tortious conversion. There seems to be no doubt that the transaction was an honest and *bond fide* one on the defendant's part; and one cannot but regret that he should lose his money. Much property of this kind is, however, intrusted to persons who have no right to sell it; and yet the trade of a furniture-broker seems to be one that may be profitably carried on. The law, therefore, has not been found to be productive of any inconvenience; and, if it had, that would make no difference, seeing that it is not at all doubtful. I think the plaintiff is clearly entitled to enter a verdict for the sum agreed on.

**CRESSWELL, J.* Two points were relied upon by my brother [•684 *Talfourd*. The first, he founded upon *Gregg v. Wells*, where it was held that the owner of goods who stands by and allows another to treat them as his own, whereby a third person is induced to buy them *bond fide*, cannot recover them from the vendee. That case differs essentially from the present; for, there the owner of the goods was present when

the person to whom he had intrusted them affected to deal with them here, however, the plaintiff did not hold out Savage as a person having authority to deal with the goods. The authority given by Cooper to Mrs. Savage to hold possession of the goods on his behalf, did not make her his agent for the purpose of assenting to the disposition of them by her husband.(a) Then comes the question whether a person intrusted with goods in this manner, can, by selling them, be guilty of any thing less than a conversion. Upon the authority of *Loeschman v. Mason*, as well as upon principle, I think, that, where a party acts so in contravention of the authority given to him, he can confer no right upon another by his wrongful act.

For these reasons, I am of opinion that this action is maintainable.

Rule absolute.(b)

(a) Vide *supra*, 675 (a).

b) Vide *Bradley v. Copley*, post, p. 685.

*685] *BRADLEY and Another v. Sir JOSEPH WILLIAM COPLEY.
Bart. May 30.

A. being indebted to B., by a bill of sale, which was found to have been *bonâ fide* executed, conveyed to him all his stock in trade, household furniture, &c., absolutely. The bill of sale (which was under seal) contained a covenant by A. to pay the debt *on demand*, and a proviso for redemption on payment of the debt and interest *on demand*, and a further proviso that the assignor should continue in possession until default. The goods having been subsequently, and before any demand made by B., seized by the sheriff under a *fi. fa.* upon a judgment entered up against A. or a warrant of attorney:—

Held, that B. had not such a right of immediate possession as to entitle him to maintain *trover* against the sheriff.

THIS was an action brought by the plaintiffs against the defendant to recover the value of certain furniture and effects, goods and chattels, seized and taken in execution and sold by the defendant as sheriff of the county of York, under a writ of *fi. fa.* issued against one John Boulton, at the suit of one Robert Taylor.

The declaration contained two counts: the first was a special count in case, upon which nothing arose for the consideration of the court; the second was a count in *trover*, to which the defendant pleaded not guilty, and not possessed; and, issue having been joined thereon, the following case was, by consent, stated for the opinion of the court:—

The plaintiffs carried on the trade of common brewers in co-partnership together at Sheffield, in the county of York, and were, at the time of the agreement hereinafter mentioned, possessed, for the residue of an unexpired term, of a certain inn or public-house situate at Rotherham, in Yorkshire, called the College Inn, and of about fourteen acres of land, and some gardens connected and held therewith; and the plaintiffs were also possessed as of their own property of certain household furniture, trade,

fixtures, and effects in and about the said inn, and of certain crops and tillages in the said land.

*In the beginning of the month of August, 1842, the said John Boulton, who had previously been a baker at Rotherham, applied [*686 to take the College Inn and land of the plaintiffs; and they agreed to let the same, and to sell him the said furniture, goods, and things, at a certain stipulated price. They accordingly *bond fide* sold and delivered such furniture, goods, and things to Boulton on the 10th of August, 1842, on which day he was let into possession of the house and land.

On the 22d of August, 1842, a bill of sale, under seal, was *bond fide* executed by Boulton and the plaintiffs, of which the following is a copy:—

“ This indenture made the 22d day of August, 1842, between John Boulton, of Rotherham, in the county of York, innkeeper, of the one part, and William Bradley and John Newton Mappin, of Sheffield, in the said county of York, common brewers, and copartners in trade, of the other part: Whereas the said John Boulton hath become tenant to the said W. Bradley and J. N. Mappin, of the College Inn, situate at Rotherham aforesaid, and of about fourteen acres of land held and occupied therewith, and hath purchased of them certain household furniture and other effects, constituting part of the effects hereinafter assigned, and the crops and tillages growing and being in and upon the said land, but hath not yet paid for the same respectively, and is now, on account thereof, justly and truly indebted to the said W. Bradley and J. N. Mappin in the sum of 196*l.* 6*s.* 5*d.*: and whereas the said W. Bradley and J. N. Mappin have required payment of or security for the said sum, and the said J. Boulton, not being at present prepared to pay the same, hath therefore consented and agreed to give to them the security contained in and by these presents: Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the sum of 196*l.* 6*s.* 5*d.* so justly due and owing from him the said *J. Boulton to the said W. Brad- [*687 ley and J. Mappin as aforesaid, he the said J. Boulton doth hereby grant, bargain, sell, assign, transfer, and set over unto the said W. Bradley and J. N. Mappin, their executors, administrators, and assigns, all and singular the household furniture, beds, bedding, plate, linen, china, stock in trade, implements, and utensils of trade, fixtures, and other goods, chattels, and effects of him the said J. Boulton, now being in, and about, upon, or belonging to the said inn or public-house occupied by him, called the College Inn, situate at Rotherham aforesaid, or any out-building or yard, garden, or place belonging to the same (as well as those purchased by him of the said W. Bradley and J. N. Mappin as aforesaid, as those previously belonging to or since acquired by him); and all the crops and tillages, and live and dead stock of him the said J. Boulton now growing or being, or which may hereafter grow or be in or upon the

aforesaid land ; and also, so far as he lawfully can, all other goods, chattels, cattle, and effects which he the said J. Boulton shall or may during the continuance of these presents acquire or become possessed of ; and all the estate, right, title, interest and property of him the said J. Boulton therein and thereto ; to have, hold, receive, and take the said furniture, goods, chattels, stocks, crops, tillages, and all other the premises hereby assigned or otherwise assured unto the said W. Bradley and J. N. Mappin, their executors, administrators, and assigns, henceforth to and for their own proper use and benefit ; subject, nevertheless, to the proviso hereinafter contained for redemption thereof, that is to say : Provided always, and it is hereby agreed and declared by and between the said parties hereto, that, if the said J. Boulton, his heirs, executors, or administrators, shall pay unto the said W. Bradley and J. N. Mappin, their

*688] executors, administrators, or assigns, the sum of 196*l.* 6*s.* 5*d.* sterling, together with interest for the same after the rate of 5*l.* *per cent. per annum*, on demand, without any deduction whatsoever, then these presents shall cease and become absolutely void : Provided further, and it is hereby further declared and agreed by and between the said parties hereto, that, if the said J. Boulton, his heirs, executors, or administrators, shall not pay unto the said W. Bradley and J. N. Mappin, their executors, administrators, or assigns, the said principal sum of 196*l.* 6*s.* 5*d.* and interest, and every or any part thereof respectively, *on demand*, it shall be lawful for the said W. Bradley and J. N. Mappin, and the survivor of them, and the executors, administrators, and assigns of such survivor, immediately upon such default or non-payment, or at any time thereafter, without any further authority than is herein contained, absolutely to sell and dispose of all and every or any of the said furniture, goods, chattels, stock, crops, tillages, and premises hereby assigned, either publicly or privately, and either together or in parcels, for as much money as can be reasonably obtained for the same ; with full power to buy in and afterwards to re-sell the same without being answerable for consequential loss ; and, in order to enable the said W. Bradley and J. N. Mappin, their executors, administrators, and assigns, more effectually to seize and take possession of all and singular the aforesaid furniture, goods, chattels, stock, crops, tillages, and premises, and to sell and dispose of the same, he the said J. Boulton doth hereby give and grant unto the said W. Bradley and J. N. Mappin, and the survivor of them, and the executors, administrators, and assigns of such survivor, and their and his bailiffs, servants, and agents, full and free liberty, power, and authority from time to time after default in payment of the aforesaid sum of 196*l.* 6*s.* 5*d.*, and interest, in manner aforesaid, to enter into

*689] and upon the aforesaid inn or public-house, land, and premises, or any other dwelling-house, public-house, shop, land, or other place or places hereafter to be occupied by him the said J. Boulton, or by his executors or administrators in that capacity, and, if necessary, to break

open any external or internal doors, gates, locks, or other fastenings, and ~~seize~~ and take possession of such furniture, goods, chattels, stock, crops, tillages, and premises, and sell and dispose thereof, either at the place where found, or at any other place or places, without any hindrance, interruption, or denial from or by the said J. Boulton, or any other person or persons whatsoever, and without being liable to any action of trespass, or other legal proceeding, for so doing: and it is hereby further declared and agreed, that the receipt or receipts in writing, of the said W. Bradley and J. N. Mappin, or the survivor of them, or the executors, administrators, or assigns of such survivor, for any money to arise from the aforesaid sale or sales, or otherwise payable to them or him by virtue hereof, shall effectually exonerate the person or persons to whom the same shall be given, from being obliged to see to the application of the money therein respectively acknowledged to be received, or to inquire into the necessity or propriety of any such sale or sales; and it is hereby further declared and agreed that the said W. Bradley and J. N. Mappin, their executors, administrators, or assigns, shall stand and be possessed of the moneys to arise from the aforesaid sale or sales, and of all other moneys, if any, which may come to their, or any of their, hands, by virtue hereof, upon trust to pay, retain, and satisfy throughout the aforesaid principal sum of 196*l.* 6*s.* 5*d.*, and all interest for the same, or so much thereof respectively as shall then remain unpaid, and also the costs and expenses attending, or relating to, the said sale or sales, or the exercise and execution of the trusts and powers herein contained; and, after payment thereof, upon further trust to pay all the *surplus moneys (if any) [*690 then remaining undisposed of, unto the said J. Boulton, his executors, administrators, or assigns, on demand: and the said J. Boulton doth hereby give and grant unto the said W. Bradley and J. N. Mappin, their executors, administrators, and assigns, and each and every of them, and their and every of their bailiffs, servants, and agents, full and free liberty, power, and authority, from time to time during the continuance of these presents, to enter into and upon the aforesaid inn or public-house and land, or any other dwelling-house, public-house, shop, land, or place hereafter to be occupied by the said J. Boulton, or by his executors or administrators in that capacity, and take an inventory, valuation, or account of the aforesaid furniture, goods, chattels, stock, crops, tillages, and premises: and the said J. Boulton, for himself, his heirs, executors, and administrators, hereby covenants with the said W. Bradley and J. N. Mappin, their executors, administrators, and assigns, that he the said J. Boulton, his executors, administrators, or assigns, will pay unto the said W. Bradley and J. N. Mappin, their executors, administrators, or assigns, *on demand*, the said principal sum of 196*l.* 6*s.* 5*d.*, together with interest for the same after the rate aforesaid, without any deduction whatsoever; and also that, if default be made in payment of the said sum of 196*l.* 6*s.* 5*d.* and interest in manner aforesaid, it shall be lawful for the said W. Bradley

and J. N. Mappin, their executors, administrators, and assigns, immediately thereupon, or at any time thereafter, to seize and take possession of all and singular the said furniture, goods, and chattels, stock, crops, tillages, and premises, and hold and enjoy the same to and for their own absolute use and benefit, for ever discharged from the aforesaid proviso for redemption thereof, and all equity thereupon, without any hindrance from or by the said J. Boulton, his executors, administrators, or assigns, *691] or any other *person whatsoever; and that freed and discharged from all former and other charges, liens, and encumbrances whatsoever; and, further, that he the said J. Boulton, his executors, administrators, and assigns, and all other persons whatsoever claiming, or to claim, any estate, charge, or interest, in, to, or upon the aforesaid premises, shall and will, from time to time, and at all times after default shall happen to be made in payment of the said principal sum of 196*l.* 6*s.* 5*d.* and interest, in manner aforesaid, at the request of the said W. Bradley and J. N. Mappin, their executors, administrators, or assigns, but at the expense of the said J. Boulton, his executors, administrators, or assigns, make, do, and execute all such other acts, deeds, assignments, and assurances for the better and more effectually granting and assigning the said furniture, goods, chattels, stock, crops, tillages, and premises, unto the said W. Bradley and J. N. Mappin, their executors, administrators, and assigns, freed from the aforesaid proviso for redemption thereof, and all equity thereupon, as by them the said W. Bradley and J. N. Mappin, their executors, administrators, or assigns, or their or any of their counsel, shall be reasonably desired, or advised and required: Provided always, and it is hereby declared and agreed, that, until default shall be made in payment of the said principal sum of 196*l.* 6*s.* 5*d.* and interest, contrary to the covenant hereinbefore contained for payment thereof, it shall be lawful for the said J. Boulton, his executors and administrators, to hold, make use of, possess, and enjoy all and singular the said furniture, goods, chattels, stock, crops, tillages, and premises, without any hindrance or denial from or by the said W. Bradley and J. N. Mappin, their executors, administrators, or assigns."

Boulton, before he entered upon the above-mentioned inn, or executed the aforesaid bill of sale, was indebted to the said R. Taylor, a miller, in *692] 90*l.* 3*s.* 2*d.*, for flour *supplied to him in the way of his trade, as a baker, at various times previously thereto by the said R. Taylor; for which, on the 11th of August, 1842, (being the day after his entry upon and occupation of the inn, and the sale and delivery to him of the said furniture, goods, and things above-mentioned,) he, Boulton, *bond fide* gave his warrant of attorney to Taylor, payable as follows, viz. 5*l.* and interest on the 24th of October then next ensuing, and the like sum of 5*l.* and interest every succeeding three calendar months, until full payment of the said sum of 90*l.* 3*s.* 2*d.*

Default having been made in payment of some of these instalments,

judgment was duly signed on the said warrant of attorney, on the 9th of May, 1843, and a writ of *fi. fa.* was duly issued thereon against Boulton, directed to the defendant, as the then sheriff of Yorkshire, and was duly endorsed; under which writ, thus endorsed, the defendant, then being such sheriff, by his officer, within a few days after the 9th of May, 1843, seized and took in execution all the goods and chattels in and at the College Inn, comprised in the said bill of sale given to the plaintiffs by Boulton.

At the time of the said seizure, the said goods and chattels were, and had continued, in the possession, and under the control, of Boulton, under and subject to the said bill of sale, and the claim and rights of the plaintiffs under or by virtue thereof, if any; and the debt from Boulton to the plaintiffs, mentioned in the said bill of sale, remained unpaid.

The plaintiffs, on hearing of the execution, on the 16th of May, 1843; and before the sale, gave Taylor and the defendant notice "that all and every the goods and chattels and effects now being in, about, or upon the dwelling-house, land, and outbuildings occupied by John Boulton, situate in or near College street, in Rotherham, in the said county of York, belong to and *were, and have ever since the 16th of August, [1842, been, the property of" the plaintiffs. Notwithstanding this notice, the goods comprised in the bill of sale were afterwards sold by auction under the execution, and the proceeds thereof were received by the defendant. And the present action was commenced against him to recover the value of the same. [*693

The question for the opinion of the court (which is to be at liberty to draw all the inferences which a jury might) is,—whether, under the circumstances above detailed, the plaintiffs, as against the said Robert Taylor, were entitled to the said goods and chattels taken in execution by the defendant. If the court are of opinion in the affirmative, the defendant agrees that a verdict shall be entered for the plaintiffs on the second count of the declaration, for 19*l.* 6*s.* 5*d.* But, if the court are of a contrary opinion, a verdict is to be entered on that count for the defendant.

Manning, Serjt., for the plaintiffs. The case finds that the bill of sale was *bond fide* executed, to secure the payment *on demand* of a debt *bond fide* due from Boulton to the plaintiffs; and there is no suggestion that the plaintiffs had any previous notice of Taylor's existence as a creditor. The circumstance of Boulton remaining in possession of the goods, is no objection; for, such remaining in possession was not inconsistent with the deed. In *Edwards v. Harben*, 2 T. R. 587, it was laid down, that it is a general rule in the transfer of chattels, that the possession must *accompany and follow* the deed: therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed. *And *BULLER, J.*, said: "So long ago as in the case in *Bulstrode*, (a) the court held that an [*694

(a) *Stone v. Grubham*, 2 Bulstr. 209.

absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent; but, if the deed or conveyance be *conditional*, then the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition. Now, here, the bill of sale was, on the face of it, absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds, or bills of sale, which are to take place immediately, and those which are to take place at some future time; for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is inconsistent with the deed; and such possession comes within the rule as *accompanying and following* the deed. That case has been universally followed by all the cases since. *Martindale v. Booth*, 3 B. & Ad. 498, still further illustrates this principle, and is almost identical with the present case. There, A. being indebted to B. in the sum of 100*l.* for goods, applied for a further supply upon credit, and for a loan. B. refused to grant either without security; and it was then agreed that A. should give a bill of sale of his household furniture and fixtures; and that B. should give him credit for 200*l.* on that security. Before the bill of sale was executed, B., upon the faith of such agreement, advanced to A. 90*l.* in money and goods, and afterwards, on the 8th of May, 1828, A. executed a bill of sale, whereby, in consideration of the debt of 100*l.*, he bargained and sold to B. all his (A.'s) household goods and furniture, &c., with proviso, that, if A. should pay the 100*l.* by instalments, the first of which was to be due on the 7th of June, the deed should be

*695] void; but, in default of payment of any of the instalments at the time appointed, it should be lawful, although no advantage should have been taken of any previous default, for B. to enter upon the premises, and take possession, and sell off the goods. There was a further proviso, that, until such default, it should be lawful for A. to keep possession of them. In 1823, A. had given a warrant of attorney to C. & D. as security for a debt of 1100*l.*, and they, in November, 1828, entered up judgment, and sued out a *fi. fa.*, under which the sheriff seized the goods; and it was held, in trespass brought by B. against the sheriff, that, under these circumstances, the bill of sale was not fraudulent by reason of A.'s having continued in possession. That case was followed by *Reed v. Wilmot*, 7 Bingh. 577, 5 M. & P. 553, where it was held that a mortgage of chattels, without delivery of possession to the mortgagee, is valid, if the mortgagor's continuing in possession be consistent with the terms of the deed. *Minshall v. Lloyd*, 2 M. & W. 450, is to the same effect.

Channell, Serjt., (with whom was *Overend*,) for the defendant. Generally speaking, the circumstance of the goods remaining in the possession of the assignor, is a badge of fraud. [CRESSWELL, J. How do you deal with the statement in the case, that the bill of sale was *bond fide* executed?]

No doubt, that presents a difficulty. [CRESSWELL, J. If the deed was *bond fide* executed, Boulton sold his goods, and transferred the property in them, to the plaintiffs.] Still, the plaintiffs are not in a situation to maintain trover; as they were not entitled to the possession of the goods: *Gordon v. Harper*, 7 T. R. 9. Boulton was to remain in possession until default in payment of 196*l.* 6*s.* 5*d.* on demand: and the case does not state that there has been a demand. In *Martindale v. Booth*, [*696 *Reed v. Wilnot*, and *Minshall v. Lloyd*, there was a day named. Here, the plaintiffs could have had no action against Boulton until after demand. The plaintiffs must rely on the conversion by the sale of the goods under Taylor's judgment, as dispensing with the necessity of a formal demand.

Manning, Serjt., in reply. The goods were absolutely conveyed to the plaintiffs by the bill of sale, subject only to Boulton's enjoyment of the use of them until default. [MAULE, J. The proviso is for payment of the money at a day not yet arrived. Suppose Boulton tenders to Taylor the amount of his debt, will he not be entitled to the goods?] Not after they have been taken in execution. In effect, the seizure under Taylor's judgment operated as a default on the part of Boulton, upon which the right of possession in the plaintiffs impliedly arose. Suppose the agreement had been that Boulton should continue in possession until the 1st of January, 1850; if Boulton had in the mean time done any thing to destroy the goods, he would have been guilty of a conversion. In Litt. § 71, it is said, "If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending." Lord COKE, commenting upon this, says: (a) "And the reason is, that, when the bailee, having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or, in these cases, he may have an action of trespass *sur le case* for this conversion, at his election." [MAULE, J. You would ask us to infer that Boulton executed the warrant of attorney for the purpose of getting the goods seized. In *Gordon v. Harper*, 7 T. R. 9, it was held, that, where goods leased (as, furniture) with *a house have been wrongfully taken in execution, the landlord cannot maintain trover against the sheriff [*697 pending the lease, because, to maintain such an action, he must have the right of possession, as well as the right of property, at the time.] There, the landlord was considered as having only a reversionary interest. [CRESSWELL, J. The plaintiffs might never be entitled to the possession of the goods.] They would be entitled on failure of Boulton to pay the money on demand; and, he being prevented by the sale from complying with his undertaking, the demand was dispensed with, according to Sir *Anthony Main's* case, 5 Co. Rep. 20 b, where it is laid down, that, if a man seised in fee covenants to enfeoff J. S. upon request, and

afterwards makes a feoffment in fee to another, J. S. shall have an action of covenant, *without request*. Suffering goods to be taken in execution under a voluntary judgment is equivalent to a conveyance.

TINDAL, C. J. Ever since the case of *Gordon v. Harper*, 7 T. R. 9, I take the rule to have been, that, to entitle a party to maintain trover, he must have the right of possession, as well as the property, in the goods sought to be recovered. That case has been followed by many; and I am unable to distinguish it from the present case, except in this, that there, the right of the landlord to the possession of the goods was postponed for a certain and definite time, whereas here, the goods were to revert to the plaintiffs at an uncertain time, viz., on default of Boulton in payment of the debt *on demand*. When the conversion complained of took place, the plaintiffs were not in a situation to require possession of the goods. I therefore think the case is governed by *Gordon v. Harper*, and that the plaintiffs are not entitled to maintain trover.

*698] *COLTMAN, J. The case of *Cooper v. Willomatt*, *antè*, p. 672, decided a few days ago, arose under circumstances somewhat analogous to those of this case. There, the goods had been demised by the plaintiff to one Savage at a weekly rent, and Savage was to hold them until demand made. Savage, however, took upon himself to sell the goods to a third party; and we held, that, although no demand had been made upon Savage, yet, as he had by his own wrongful act disabled himself from restoring the goods, the plaintiff might maintain trover for them against the vendee. We so held expressly on the ground that the bailment had been determined by the voluntary act of the bailee himself. We thought the case then before us distinguishable from that of *Gordon v. Harper*, on the ground that the act which constituted the conversion, was the act, not of the sheriff, but of the party himself. The present case, however, is much stronger in favour of the defendant than was *Gordon v. Harper*: there, a simple demand only was necessary; here, on a demand being made, the debtor had the option of paying. For these reasons, I think our judgment must be for the defendant, on the count in trover.

MAULE, J. This is an action of trover, in which the defendant has pleaded not guilty, and a denial of the plaintiffs' possession. The question for the opinion of the court is, whether the plaintiffs were lawfully possessed of the goods. That, I apprehend, means, so entitled to the immediate possession as to enable them to maintain this form of action. I think they were not so entitled. It seems to have been intended, on the part of the defendant, to be contended that the deed under which the plaintiffs claimed, was void. All question, however, as to the validity
*699] of the bill of sale is excluded by the *statement in the case, that it was "*bonà fide* executed by Boulton and the plaintiffs."

The other point raised is, I think, conclusive against the plaintiffs' right to recover. The case is not to be distinguished from *Gordon*

v. Harper, which has often been cited, and has never been disproved of. (a)

CRESSWELL, J. I am entirely of the same opinion. Upon the plea of not possessed, the plaintiffs must succeed on the first point, the case expressly finding that the bill of sale was *bond fide* executed. But construing the deed according to its terms, it clearly did not give the plaintiffs a present right of possession; nor did the sale by the sheriff. Before the plaintiffs could be entitled to possession of the goods, it was necessary that there should have been a demand of the money, and a failure, on the part of Boulton, to comply with that demand. Neither of these things has happened; and therefore the plaintiffs had not such a present right of possession as would entitle them to maintain trover.

Judgment for the defendant.

(a) Lord Kenyon there says: "The true question is, whether, when a person has *leased* goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can, notwithstanding, recover the value of the whole property, pending the existence of the *term*, in an action of trover. The very statement of the proposition affords an answer to it." But, is the statement correct? If goods are incapable of being *leased*, (*vide ante*, 676,) the legal character of the transaction in *Gorden v. Harper* would appear to be, a *license* to use the goods in a certain way during the term granted in the house; and a question might arise, whether the license, though given for a definite period, was not determinable by the wrongful act of the licensees.

*CHADWICK v. CLARKE. May 24.

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A joint-stock company, of which the plaintiff and defendant were both directors, occupied a house belonging to the plaintiff. A draft agreement, prepared by the plaintiff's attorney, was submitted to the solicitors of the company, and by them approved and returned; and, at a subsequent meeting of the directors, a resolution was made empowering the solicitors to sign the agreement on behalf of the company. The agreement, however, was never executed. In debt for use and occupation, the plaintiff offered the draft in evidence, not as an agreement binding *per se*, (it being neither dated, stamped, nor signed,) but for the purpose of showing that the occupation of the premises was to be by the other directors, *exclusive of himself*:—

Held, that the draft was inadmissible, for want of a stamp, inasmuch as it could only be relied on as proof of the special agreement, the plaintiff's position precluding him from maintaining an action against a co-director upon an *implied contract*.

DEBT, for use and occupation. Plea, never indebted.

By his particulars of demand the plaintiff claimed 210*l.* for "one year's rent, from the 25th of December, 1842, to the 25th of December, 1843, of house and premises No. 2, Adelaide Place, in the city of London, occupied by the Oriental, Colonial, and General Life-Assurance Company, of which company the defendant was director," and 15*l.* for charges of valuation of fixtures agreed to be taken by the company.

The cause was tried before MAULE, J., at the second sittings in London in Easter term last. The facts were as follow:—In November, 1842, certain persons associated themselves together for the purpose of establishing a company to be called The Oriental, Colonial, and General Life-

Assurance Company. The defendant was named one of the directors, and, as such, attended several meetings. The plaintiff also was, by a resolution of the 20th of December, appointed a director of the proposed company. There was no evidence, however, of his having assumed to act as a director before the 12th of January, 1843.

At a meeting held on the 29th of December, 1842, the defendant being
 *701] one of the directors then present, it was resolved "that the premises No. 2, Adelaide Place, city, be provisionally rented for one year from the 1st of January, 1843, with power of having a lease for twenty-one years, at the expiration of that term, at a rent of 210*l.* per annum, to contain the usual covenants and conditions." A correspondence took place between the solicitors for the company and the plaintiff's solicitor, which resulted in an agreement being drawn up by the latter, and submitted to the former for approval and signature.

At a meeting held on the 5th of January, 1843, at which also the defendant was present, it was resolved, "that the sub-committee be authorized to take steps for the immediate occupation of the house taken for the company;" and "that the solicitors be authorized to sign the agreement with Mr. Chadwick, on behalf of the directors."

On the part of the defendant it was objected, that these resolutions were inadmissible to prove an agreement, for want of a stamp; and the case of *Lucas v. Beach*, 1 Mann. & Gr. 417, 1 Scott, N. R. 350, was cited. To this it was answered, that, inasmuch as the resolutions were not offered as evidence of any agreement, no stamp was necessary; and *Vaughton v. Brine*, 1 Mann. & Gr. 359, 1 Scott, N. R. 258, was relied on. The objection was overruled.

In order to show a distinct contract between the plaintiff and the directors personally, Mr. Sturmy, the plaintiff's attorney, was called. He stated that he forwarded a draft-agreement to Mr. Wathen, one of the company's solicitors, on the 5th of January, 1843, and that Wathen brought it back to him on the same day, with certain alterations, to which he (Sturmy) did not object.

The agreement commenced as follows:—

*702] "Memorandum of agreement made this ——— day of January, 1843, between William Chadwick, of, &c., for himself, his executors and administrators, of the one part, and J. B. Wathen and E. Strick, solicitors and agents of and for and on behalf of the directors of the Oriental, Colonial, and General Life-Assurance Company, (save and except the said William Chadwick,) of the other part." The agreement witnessed "that the said William Chadwick doth hereby agree to let unto the said directors and other the directors for the time being, (except the said William Chadwick,) and the said J. B. Wathen and E. Strick, as such solicitors for and on behalf of the said directors, (except as aforesaid,) do hereby agree to take and rent of the said William Chadwick, all that messuage or tenement, situate and being in Adelaide Place, Lon-

don Bridge, in the city of London, and known as No. 2, there," &c. &c. The agreement then went on to provide for payment of the rent quarterly, for the purchase by the company of the fixtures, for a future lease, and other matters. There was no evidence of actual occupation by the company beyond one quarter of a year.

On the part of the defendant, it was objected that this draft agreement (which had no signature) was inadmissible, for want of an agreement stamp.

The learned judge being of opinion that this objection was well founded, nonsuited the plaintiff, reserving to him leave to move to enter a verdict for 52*l.* 10*s.*, if the court should be of opinion that the draft was admissible, notwithstanding the want of a stamp, to prove the terms upon which the premises had been occupied.

Shoe, Serjt., in Easter term, accordingly obtained a rule nisi. He referred to *Cully v. Smith*, 2 M. & Rob. 96; *Ramsbottom v. Tunbridge*, 2 M. & Sel. 434; *Ramsbottom v. Mortley*, 2 M. & Sel. 445; *Wheldon v. Matthews*, 2 Chitt. R. 399; *Parker v. Dubois*, 1 M. & W. 30; [703 *Doe dem. Lambourn v. Pedgriph*, 4 C. & P. 312; *The King v. The Inhabitants of St. Martin, Leicester*, 2 Ad. & E. 210; *Vaughton v. Brine*, 1 Mann. & Gr. 359, 1 Scott, N. R. 258; *Hawkins v. Warre*, 3 B. & C. 690, 5 D. & R. 512; and *Drant v. Brown*, 3 B. & C. 665, 5 D. & R. 582.

Byles, Serjt., (with whom was *Wordsworth*,) now showed cause. Assuming the date of the agreement to be the 5th of January, that being the day on which the draft was returned approved on the part of the company, the plaintiff is not in a condition to maintain an action on any agreement to be implied from the occupation of the premises in question by the company, seeing that he was himself a director, and consequently a joint occupier with the defendant and the other directors. The plaintiff must, therefore, rely upon the unsigned agreement in writing produced by Mr. Sturmy, as containing the terms on which the company contracted with him; and, if so, it clearly required a stamp. The stat. 55 G. 3, c. 184, Sched. Part 1, tit. *Agreement*, imposes a stamp upon any "agreement, or any minute or memorandum of an agreement, made in England, under hand only, or, made in Scotland, without any clause of registration, (and not otherwise charged in this schedule, nor expressly exempted from all stamp-duty,) where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument." In *Drant v. Brown*, 3 B. & C. 665, 5 D. & R. 582, which is the only case of those cited that at all approaches this, the document was a mere proposal. A. entered into a written agreement with B. for the hire of a piece of land for the purpose of making bricks. C. afterwards made an offer in writing to let another [704 piece of land to A., upon the terms contained in the agreement between him (A.) and B., and, at a subsequent time, A. verbally accepted this offer. In an action by C. for a breach of some of the terms of this

contract, it was held that the written offer made by C. was admissible in evidence without being stamped. [CRESSWELL, J. The distinction between the two cases is this: in *Drant v. Brown*, the paper offered in evidence was a mere *proposal*: here, it is the *result* of the negotiation. ABBOTT, C. J., there says: "I quite agree to the proposition of law laid down for the defendant, that if a bargain made by parol is afterwards reduced into writing, that is the perfection of the agreement: but here the order was reversed; a written proposal was made at the first meeting, but then it was uncertain whether there would or would not be a contract. The fact as to the agreement between Leggott and Grant was first to be ascertained. Then an agreement was made, by parol, that Leggott should have the land on certain terms. The writing signed by the plaintiff was a mere proposal, and was never signed by Leggott. The plaintiff, therefore, had legally made out his case before that paper was produced, and, when produced, it did not show that there was any written contract." What evidence is there here that the proposal was assented to, but this paper? MAULE, J. It becomes a mere question whether the absence of signature lets in the unstamped agreement.] The words "under hand only" in the stamp act, do not import that actual signature is necessary, but are used merely to denote an agreement not sealed, in contradistinction from a *deed*. If this were not so, the act might always be evaded. And there is nothing in the dictum of PATTESON, J., in *The King v. The Inhabitants of St. Martin, Leicester*, 705] 2 Ad. & E. 210, that at all militates against this construction. [CRESSWELL, J. *Williams v. Stoughton*, 2 Stark. N. P. C. 292, is a strong authority to show that a stamp is necessary, notwithstanding the document bears no signature, provided it be the evidence of the agreement? *Shee*, Serjt., (with whom was *Haggins*,) in support of the rule. At the assumed date of this agreement, the plaintiff was not a director. [CRESSWELL, J. The agreement shows that he was. MAULE, J. The only point is, as to the necessity of a stamp.] It is submitted that no stamp was necessary. The paper produced was neither an agreement nor a minute or memorandum of an agreement. There was no point of time at which any thing had been definitely arranged. Until the document was finally settled as the terms of the letting, and signed by the respective parties, neither would be bound by it. All was still *in fieri*. The paper might clearly be looked at for the purpose of showing who were the contracting parties. [MAULE, J. This agreement seeks to alter the natural position of the parties. That intention not having been completely carried into effect, the jury would infer that it had been abandoned. The plaintiff's case must fail without an express agreement; for, the law will not *imply* an agreement for the occupation of premises on behalf of a firm, made by one of the partners with the rest of the firm. And you cannot have the benefit of the special agreement, without evidence of it. *Sturmy* could have proved, and did prove, who were the contracting parties. The paper was offered at the trial, not for that purpose merely, but to show the terms of the taking.¹

This is not an agreement that could be enforced, even in equity, without proof of mutual assent to its terms: upon the face of it, it is a mere proposal [COLTMAN, J. The terms were "assented to. The document was complete, except in respect of signature and date; and the latter is not material.] [706] The case very closely resembles that of *Dos d. Lambourn v. Pedgriph*, 4 C. & P. 312: there, a draft-agreement had, on the back of it, the following memorandum—"We approve of this draft;" and this was signed by the parties: and it was held that no stamp was requisite. [CRESSWELL, J. Lord TENTERDEN is there reported to have said that the words do not import an agreement. Suppose, instead of "We approve of this draft," the words had been "We agree on the terms herein," would not that have been an agreement? As reported, the decision is a very strong one.] Lord TENTERDEN evidently intended it to be so. In *The King v. The Inhabitants of St. Martin, Leicester*, PATTESON, J., distinctly says: "The statute imposes a stamp upon agreements under hand only, meaning such as have *per se* the binding effect of an agreement." In *Ramsbottom v. Tunbridge*, 2 M. & Sel. 434, a written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but *not signed by the auctioneer or any of the parties*, was held not to be such a minute of the agreement as was required to be stamped, pursuant to the statute 48 G. 3, c. 149, nor such a writing as would exclude parol evidence. *Ramsbottom v. Mortley*, 2 M. & Sel. 445, is the converse of that case. There, a written paper *signed by the auctioneer*, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, and the rent payable, was held to require a stamp, pursuant to the same statute. *Drant v. Brown*, 3 B. & C. 665, 5 D. & R. 582, though [707] differing in its facts, is not distinguishable in principle from the present case. HOLROYD, J., there said: "A stamp is not necessary to every writing given in evidence to support an agreement, but only to agreements themselves, or minutes or memorandums of agreement. This was a mere proposal: if it had been accepted by writing, that must have been stamped, but, being accepted by parol, the agreement was, in law, a parol agreement." The cases of *Ramsbottom v. Tunbridge*, and *Ramsbottom v. Mortley* are cited with approbation, by Lord TENTERDEN, in *Hawkins v. Warre*, 3 B. & C. 690, 5 D. & R. 512. In that case the defendant's steward proved that a lease had been executed by the defendant, but not by the plaintiff, the terms of which had been reduced into writing by the assent of both parties; and he stated that to be the final agreement between them. The plaintiff, in order to negative this statement, tendered in evidence another unstamped paper in the handwriting of the defendant's steward, the effect of which was, to show that it was subsequently proposed by him that the plaintiff was to hold at a rent different from that mentioned in the lease; and it was held, that, *as this paper was not signed by the parties*, it did not

show it to an agreement or minute of an agreement, but to a proposal only, and therefore that it did not require a stamp, and was properly received in evidence. With respect to *Williams v. Stoughton*, 2 Stark. N. P. C. 292, it may be observed that PARKE, B., on a recent occasion declined to be bound by that case.

COLTMAN, J.(a) I am of opinion that this rule ought to be discharged. One argument that has been urged on the part of the plaintiff, is, that no document can require a stamp unless it be signed, the words of the stamp

*708] "act imposing a duty upon any "agreement, or any minute or memorandum of an agreement, made in England, *under hand only*." It appears to me, however, that that is not the meaning of the statute, but that the legislature, in using that expression, merely intended to denote instruments *under hand only*,—that is, not *under seal*,—in opposition to instruments under seal. The words that follow, "or made in Scotland, without any clause of registration," show this to be the true construction—an instrument with a clause of registration, in that country, having the same force as an instrument under seal with us. It is a more solemn mode of contracting. It has been further insisted that the document in question is to be looked at as a mere proposal, and not as an agreement or minute or memorandum of an agreement, and therefore requires no stamp. It appears to me, however, that this really was the agreement between the parties. It purports, on the face of it, to be an agreement for the taking of the house for the use and occupation of which the action is brought. It is drawn up formally by the landlord's attorney, and by him sent for approval to the solicitors of the company, submitted to a board of directors, and returned with alterations, which are assented to on the part of the landlord. We also find the directors passing resolutions to take the premises, and to authorize their solicitors to sign the agreement on their behalf. All this shows that both parties were treating the instrument in question, not as a mere proposal, but as an agreement. It therefore falls within the description of documents in the statute that require a stamp to give them force and validity, and to render them admissible as evidence of a contract.

CRESSWELL, J. I also am of opinion that this rule should be discharged. The action is brought in respect of the use and occupation of a house, oc-

*709] cupied by the *defendant and others, including the plaintiff, as members and directors of a joint-stock company. From the use and occupation of premises, the law implies a contract to pay rent. The circumstance of the plaintiff being a joint-occupier together with the defendant and the other parties, introduces the difficulty that arose in *Holmes v. Higgins*, 1 B. & C. 74, 2 Dowl. & R. 196, and that class of cases. In order to remove that difficulty, it became necessary to show an *express contract*; and for that purpose the draft agreement was produced. And upon its being objected on the part of the defendant that the document is inadmissible without a stamp, the plaintiff's counsel insists that it is not an

(a) Tindal, C. J., was engaged on the crown jewels case.

agreement, but a proposal only. If this were so, there would be no express contract at all; and, consequently, the plaintiff would be remitted to the dilemma he was in before the instrument was produced. It is then said that the plaintiff may prove a previous complete parol contract: but that is inconsistent with the other part of the argument. It is quite clear that this was the complete contract, or it was nothing at all to the purpose. It is further contended that no stamp is necessary, because the document is not *signed* by the parties. I fully agree with my brother COLTMAN, that, if the instrument embodies the terms of the contract, and is the agreement by which the parties are to be bound, a stamp is requisite, although there be no signature attached. Here, there is nothing but the draft-agreement in question to show the terms upon which the directors contracted. The resolutions could refer to nothing else. I think the nonsuit was quite right.

MAULE, J. I still continue to think that the document in question was inadmissible, for want of a stamp. It appeared that the plaintiff himself was one of the *persons who would be liable under an *implied* contract for the use and occupation of the premises for which he sought to charge the defendant. That is an answer to the action, unless the difficulty is obviated by legal proof of an *express* contract. Throughout the whole case there was no evidence of any agreement such as the plaintiff relied on, other than this written document. The draft was introduced by the evidence of Sturmy, who said that he forwarded a draft agreement to Wathen, one of the company's solicitors, on the 5th of January, 1843, and that Wathen brought it back to him on the same day, with certain alterations, to which he (Sturmy) did not object. The draft was then offered in evidence, and objected to, not being stamped. On the part of the plaintiff, it is insisted the statute imposes a duty upon agreements "under hand only," which is supposed to mean "signed by the parties." Where, however, the terms of an agreement are reduced into writing, in the shape of a proposal on one side, assented to on the other, that is a binding contract. The statute of frauds shows that signature is not essential to constitute an agreement: it assumes that there may be binding agreements without signature. This paper was offered as a binding agreement between the parties. The law not requiring the authentication of an agreement in writing, except in cases falling within the statute of frauds, the question is, whether the words "under hand only," in the stamp act, require the agreement to be signed, to render it liable to stamp-duty. Looking at those words, coupled with those that follow, as to agreements made in Scotland without any clause of registration, and seeing that agreements might be made that would be perfectly valid and effectual without any stamp, if in all cases agreements not signed were held not to be within the statute; it seems to me to follow that the true construction of the stamp-act is that which *has al- ways been put upon it, viz., that, if the document contain the terms

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of the agreement between the parties, a stamp is requisite. For these reasons, I am of opinion that the document produced in this case ought to have been stamped, and that the nonsuit was right.

Rule discharged.

DOE dem. REYNOLDS v. ROE. May 24.

Where a subsequent acknowledgment by the attorney of the tenant, is relied on to aid an insufficient service of the declaration and notice in ejectment, the affidavit must distinctly show that the party is the tenant's attorney in the matter.

BYLES, Serjt., moved for judgment against the casual ejector, upon an affidavit of service of the declaration and notice on a servant of the tenant upon the premises, and alleging an acknowledgment, by the tenant's attorney, of their having come to his hands before the term. He referred to *Tenney v. Mills* v. *Cutts*, 1 Scott, 52, where a similar affidavit was held sufficient; and also to Archbold's Practice, 7th edit. p. 739. [MAULE, J. How does it appear that the party who makes the acknowledgment is the attorney of the tenant?] The affidavit states that the action was brought to recover possession of premises mortgaged by Woodward, the tenant in possession, in 1837, to secure the payment of 3200*l.* on certain days; that 2000*l.* and interest were due, and that, Woodward having made default, this action was brought to recover the possession, and also an action of covenant against Woodward to recover the mortgage-debt; that, in the latter action, a *distringas* had been obtained, and an appearance thereupon entered for Woodward, by Tucker and Stevenson, his attorneys; that the declaration and notice in ejectment were served upon a shopman of Woodward upon *712] the premises; and that the plaintiff's attorney had since such service seen Tucker, who came to him with a view, as he stated, of settling both actions, and that, on that occasion, certain terms were proposed, but the negotiation ultimately proved unsuccessful.

COLTMAN, J. The authorities cited seem to be in point; and the affidavit sufficiently shows that Tucker was Woodward's attorney.

Rule granted.(a)

(a) Vide *Doe dem. Gibbard v. Roe*, 3 Mann. & Gr. 87, 3 Scott, N. R. 363.

ATKINSON v. FOSTER. May 24.

In an action against one of two part-owners upon a charter-party made by him alone:—*Held*, that another part-owner, who was no party to the action, and did not authorize the defence, was a competent witness for the defendant.

ASSUMPSIT, on a charter-party, to which the plaintiff and defendant only were parties. At the trial before WIGHTMAN, J., at the last assizes at Liverpool, the captain who was called as a witness on the part of the defend-

ant, stated, on the *voir dire*, that he was a part-owner of the ship with the defendant. It was thereupon objected, for the plaintiff, that he was not a competent witness, inasmuch as he had a direct interest in the event of the suit, being substantially a co-defendant. Upon his stating, however, that he did not defend the action, or authorize the defence, the learned judge thought him a competent witness under Lord DENMAN's act, 6 & 7 Vict. c. 85, and accordingly permitted him to be examined.

The jury returned a verdict for the defendant.

Byles, Serjt., in Easter term, obtained a rule nisi for a new trial, on the ground that the captain's evidence had been improperly received.

* *Channell*, Serjt., (with whom was *Hugh Hill*,) now showed [713] cause. "One part-owner, although he be the husband, cannot, as such, pledge the others to the expenses of a lawsuit:" Abbott on Shipping, 7th edit., p. 107. (a) What possible objection, then, could there be to the competency of the witness in this case? Putting it at the highest, part-owners of a ship are but joint-contractors with the others; and in that view the captain was a competent witness under the 3 & 4 W. 4, c. 42, s. 26; (b) *Russell v. Blake*, 2 Mann. & Gr. 374, 2 Scott, N. R. 574; *Poole v. Palmer*, 9 M. & W. 71. If there be any doubt as to his admissibility under that statute, he is clearly made competent by the enacting part of the 6 & 7 Vict., c. 85, (c) and is not within the exceptive proviso.

(a) Citing *Campbell v. Stein*, 6 Dow. 135.

(b) Which, "in order to render the rejection of witnesses, on the ground of interest, less frequent," enacts, "that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined, but, in that case, a verdict or judgment in that action in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him."

(c) The first section of which recites, that "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony;" and enacts "that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having, by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: provided also, that this act shall not repeal any provision in the 7 W. 4 and 1 Vict. c. 26: Provided, that, in courts of equity, any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such

*714] **Byles*, Serjt., in support of the rule. The witness was clearly incompetent at common law. [MAULE, J. I do not think that is quite so clear. The defendant alone lets the ship to the plaintiff: the contract is between those two only.] The case is distinguishable from that of co-contractors. Under a writ of *fi. fa.*, the sheriff would seize the entire ship, though he could only sell the defendant's interest. [MAULE, J. Do you contend that tenants in common of chattels cannot be witnesses for each other?] No; but it is submitted that these parties are partners. [MAULE, J. They are tenants in common of the ship, and, it may be, partners for the particular voyage.] *Russell v. Blake* and *Poole v. Palmer* are altogether inapplicable. They were cases of co-contractors. Between part-owners the accounts can only be taken in equity. [MAULE, J. The 3 & 4 W. 4, *c. 42, *715] s. 26, is not restrained to courts of law. CRESSWELL, J. What is the particular interest the witness in this case is supposed to have?] The joint fund would be affected by a verdict against the defendant, and that, directly, and not, as in the case of joint-contractors, through the intervention of an action at law. [CRESSWELL, J. How could the witness be charged without showing the judgment?]

Byles, Serjt., then admitted that he could not successfully contend that the competency of the witness was not restored by the 3 & 4 W. 4, c. 42, s. 26.

Rule discharged.

cause, saving just exceptions; and that any interest which such defendant, so to be examined, may have in the matters or any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect the credit of such defendant as a witness.

MASTERS v. FARRIS. May 26.

In case upon the 2 W. & M., c. 5, s. 4, for double value, for distraining, no rent being due, the jury ought to be directed, if they find for the plaintiff, to give damages to double the amount of the value of the goods.

Held, that a motion to increase the damages found by the jury upon a trial in the vacation, made after the first four days of the term, is too late.

THIS was an action on the case upon the statute 2 W. & M., sess. 1, c. 5, s. 4, for distraining the plaintiff's goods, no rent being due. The declaration also contained a count in trover.

Plea, not guilty "by statute."

At the trial, before MAULE, J., at the second sitting at Westminster, in Easter term, (the 24th of April,) it appeared that the goods seized were sold for 1*l.* 14*s.* There was conflicting evidence as to whether or not any rent was due; and the case went to the jury, who returned a verdict for the plaintiff, damages 1*s.*

Talfourd, Serjt., now (on the fifth day of term) moved to increase the damages to 3*l.* 8*s.*, being double the value of the goods distrained, the

act (a) giving the *plaintiff specifically that amount. [MAULE, J. [716
The jury certainly ought to have been directed, if they found for the plaintiff, to give damages to the amount of double the value of the goods. I do not recollect having so directed them; nor do I remember that I was asked to do so.]

TINDAL, C. J. The mistake should have been set right at the time. At all events, the application to the court should have been made within four days of the return of the jury-process.

MAULE, J. The complaint in substance is, that the jury have given an insufficient amount of damages. I thought at the time, and still think, that the verdict should have been for the defendant. The application is clearly too late.

The rest of the court concurred.

Rule refused.

(a) Which provides, "that, in case any distress and sale shall be made by virtue or colour of this present act for rent pretended to be arrear and due, where, in truth, no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names, or right, such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case,* to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

* And see 11 G. 2, c. 19, s. 19; *Winterbourne v. Morgan*, 11 East, 395, 401; *Smith v. Goodwyn*, 2 Nev. & M. 114, 6 Nev. & M. 615, n.

*DOE dem. WILLIAMS and PROTHEROE v. EVANS. May 26. [717

A sale by an administrator of a "pretended right or title" to premises of a term in which the intestate died possessed, but of which the administrator never had possession, is within the prohibition of the statute 32 H. 8, c. 9.

A., possessed of a term, died in 1828. B., who had during A.'s life resided on part of the premises, at A.'s death claimed and took possession of the whole, and retained it till he died in 1829, having by his will devised the premises to C., who remained in undisturbed possession until 1841, when A.'s next of kin took out letters of administration, and sold his right or title in the premises to D.:—*Held*, that the conveyance was void, as well at common law as by the stat. 32 H. 8, c. 9.

THIS was an action of ejectment brought to recover the possession of certain premises situate in the county of Glamorgan.

At the trial before CRESSWELL, J., at the last assizes at Swansea, the material facts that were given in evidence were as follows:—

One Evan Richards, being possessed for a long term, under a lease bearing date in 1802, of certain premises, assigned all his interest therein to one Wyndham Lewis, from whom he, in 1807, took an under-lease of part of them, for a term not yet expired. Evan Richards had a brother Jenkin, who resided on a portion of the premises, whether as tenant or otherwise there was no evidence to show. Evan Richards died in 1828. Jenkin Richards remained in possession, claiming to be entitled to all the premises held by Evan under the lease of 1807, until 1829, when he died, having

previously devised the premises in question to the present defendant. After the death of Jenkin Richards, the defendant continued in undisturbed possession till 1841, when the lessors of the plaintiff, after making ineffectual attempts to turn him out, discovered the next of kin of Evan, (Thomas Richards,) and induced him to take out letters of administration to the effects of Evan, and to assign his supposed interest in the premises, to Protheroe, (one of the lessors of the plaintiff,) for 10*l*. There was no evidence that Thomas Richards, the administrator, ever was in possession of, or made any claim to, the premises.

*718] "On the part of the defendant, it was objected that the conveyance by Thomas Richards to Protheroe was void, as being contrary to the statute 32 H. 8, c. 9.

A verdict was taken for the lessors of the plaintiff, subject to leave reserved to the defendant to move to enter a verdict for him, if the court should be of opinion that the objection was well founded.

Sir *T. Wilde*, Serjt., in Easter term, accordingly obtained a rule nisi.

Channell, Serjt., (with whom was *E. V. Williams*,) now showed cause. This is not the case of one who is in by disseisin of the rightful owner, but it is to be looked at as the case of a permissive occupation by Jenkin Richards in his brother's lifetime, continued since his death for a period short of twenty years, without any acknowledgment of title in his administrator. The case is, therefore, not within the statute 32 Hen. 8, c. 9. The 2d section (a) prohibits in general terms the buying of pretended titles; and *719] the 4th, which comes by way of proviso, enacts "that it shall be lawful to any person or persons being in lawful possession by taking of the yearly farm rents or profits of or for any manors, lands, tenements, or hereditaments, to buy, obtain, get, or have, by any reasonable ways or means, the pretended right or title of any other person or persons hereafter to be made to, of, or in such manors, lands, tenements, or hereditaments, whereof he or they shall so be in lawful possession; any thing in this act contained to the contrary notwithstanding." Here, the possession of the devisee of Jenkin Richards was the possession of Evan's administrator. The statute underwent some discussion in *Doe d. Oliver v. Powell*, 3 N. & M. 616, though the decision turned upon another point. [MAULE, J. That was the case of a conveyance by the assignees of a bankrupt. It may well be that

(a) Which enacts, "that no person or persons, of what estate, degree, or condition soever he or they be, shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons in or to any manors, lands, tenements, or hereditaments, (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made,) upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, to [sic] forfeit the whole value of the lands, tenements, or hereditaments so bargained, sold, promised, covenanted, or granted contrary to the form of this act; and the buyer and taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments so by him brought or taken as is above said.

an assignee stands in a different position from an ordinary individual. Besides, the mischief of the statute could hardly apply to the case of a sale of a large estate, the vendor being at the time out of possession of a small part only. The case we are now discussing is the case of a specific purchase of the very title, which seems to me to fall directly within the act.] It is observed in the course of the argument in that case, that, at the time the act passed, *choses in action* were not assignable—a rule which for the general convenience of mankind has since been considerably relaxed. So, a right of entry is not assignable: (*a*) *Goodright d. Fowler v. Forrester*, 1 Taunt. 578; *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008. It clearly is not embracery within the meaning of the act, where the party does not intend to sell a *suit*: *Williams v. Protheroe*, 5 Bingh. 309, 2 M. & P. 779. The statute does not in terms avoid the conveyance; it merely imposes a penalty. The cases wherein it has been held that one who is a party to a *contract for the sale of goods, or for the doing of an act, contrary [*720 to the provisions of a statute, cannot enforce it in a court of law, have no application here. Lord COKE, commenting on sec. 701, of Littleton, says, (p. 369 a): “Since Littleton wrote, there is a notable statute made in suppression of the causes of unlawful maintenance (which is the most dangerous enemy that justice hath); the effect of which statute is, first, that no person shall bargain, buy, or sell, or obtain any pretended rights or titles; secondly, or take, promise, grant, or covenant to have any right or title of any person in or to any lands, tenements, or herecuitaments, but, if (unless) such person which shall so bargain, &c., their ancestors or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole year, &c., upon pain to forfeit the whole value of the lands, &c., and the buyer or taker, &c., knowing the same, to forfeit also the value; thirdly, provided that it shall be lawful for any person, being in lawful possession, by taking of the yearly farm rents or profits, to obtain and get the pretended right or title, &c., of any lands whereof he or they shall be in lawful possession. For the better understanding of which statute, you must observe, that title or right may be pretended two manner of ways: first, when it is merely in pretence or supposition, and nothing in verity: secondly, when it is a good right or title in verity, and made pretended by the act of the party: and both those are within the said statute: for example, if A. be lawful owner of land, and is in possession, B., that hath no right at all, but only in pretence.” [TINDAL, C. J., referred to *Underwood v. Lord Courtown*, 2 Sch. & Lefr. 65, where Lord REDESDALE said: “A person out of possession cannot in *law convey any thing [*721 to a stranger; he can give only a release to one in possession; and the law has wisely provided this, in order to quiet possessions.”] In that case the facts are extremely complicated: acts had been done which clearly amounted to a disseisin. [MAULE, J. The principal mischief con-

(a) Rights of entry are now made alienable by deed, by 8 & 9 Vict. c. 106, s. 6.

templated by the act is, the maintenance of an action by the purchaser upon the pretended title. How is that mischief to be obviated, except by making the conveyance void?] The mischief cannot arise in the case of a conveyance by an executor or an administrator. It may be that no administration is taken out for more than a year after the death. [TINDAL, C. J. In the case of a tenancy, the mere discontinuance of rent for a year would not alter the character of the holding; for the relation of landlord and tenant would still exist.]

Byles, Serjt., (with whom was Sir *T. Wilde*, Serjt.,) in support of the rule. Since the 7 W. 4 & 1 Vict. c. 26, s. 3, and the 7 & 8 Vict. c. 76, s. 5, the rights of entry may be devised, and contingent rights conveyed. The evidence given on the part of the lessors of the plaintiff did not show that Jenkin Richards, in any sense, claimed under Evan: on the contrary, it showed a claim by Jenkin altogether inconsistent with the relation of landlord and tenant between himself and Evan. The first question here is, whether, at common law, independently of the statute 32 H. 8, c. 9, one who is out of possession could assign a right of this sort. Since the statute 3 & 4 W. 4, c. 27, ss. 2, 15, 34, this is, as against an administrator, clearly an adverse possession. There are not wanting authorities to show that the statute 32 H. 8, c. 9, is, in this respect, declaratory only of the common law. Thus, in *Partridge v. Strange*, Plowden, 88, MOUNTAGUE, C. J., *722] *says: "Before I enter into the consideration of the statute, I will lay down what is a pretended right or title. And it seems to me that a pretended right or title is but in one case, and that is, where one is in possession of lands or tenements, and another, that is out of possession, claims them, or sues for them; that is a pretended right or title. For, if one has a right or title to land, and afterwards he comes to the possession of the same land, his right or title is extinct or suspended in the land; for, during the time that he has the land, it is not *in esse*; ergo, during that time, it cannot be termed a right or title. And that such is a pretended right or title, is proved by the statute itself; which has a proviso in it, that *it shall be lawful for any one, being in lawful possession, to buy or obtain the pretended right or title of any person or persons, to such lands, &c.* So that, when the statute saith *he in the possession may buy the pretended right of any other*, it declares my definition to be true. Further, I take the statute, that, if he who is out of possession bargains or sells, or makes any covenant or promise to part with, the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells, or promises, have a good and true right or title or not: and, in this point, the statute has not altered the law; for, the common law, before this statute, was, that he who was out of possession might not bargain, grant, or let his right or title, and, if he had done it, it should have been void. Then, this statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before, viz., that a man shall forfeit the value of the thing bargained or pro-

mised, &c. ; and to avoid such bargains or promises, where a man is out of possession, is the only *point which the statute here remedies." [*723
 LITTLETON says (s. 347): "No entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs ; and such re-entry cannot be given to any other person." Upon this section, Lord COKE observes: (a) "Here, LITTLETON reciteth one of the maxims of the common law ; and the reason hereof is, for avoiding of maintenance, suppression of right, and stirring up of suits ; and therefore nothing in action, entry, or re-entry can be granted over ; for, so, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, *which the common law forbiddeth,—as men to grant before they be in possession.*" So, in Sheppard's Touchstone, (page 240,) it is laid down, that "things in action, and things of that nature, as, causes of suit, rights and titles of entry, are not grantable over to strangers but in special cases. And therefore, if a man have disseised me of my land, or taken away my goods, I may not grant over this land or these goods until I have seisin of them again. Neither can I grant the suit, which the law doth give to me for my relief in these cases, to another man." If, therefore, the right of entry in the present case be one for which an action of *ejectione firma*, or a writ of *quare ejecit infra terminum*, would have lain, it needs not the aid of the statute 32 H. 8, c. 9, to render the conveyance void. The statute, however, does, in terms, declare the conveyance to be void.

TINDAL, C. J. This appears to me to be a transaction which it was the very object of the statute to prevent. It is a case in which one man being in quiet possession of an estate, another man buys a supposed title, and brings an *action upon it. It appears from the evidence, that Evan [*724 Richards, the original tennor, died in the year 1828. His brother Jenkin Richards,—being in possession of part of the premises before the death of Evan,—when that event happened took possession of the other part, and continued so in possession until his death in 1829. By his will he bequeathed such right as he then had to the present defendant, who, from thence down to the year 1841, remained in possession without dispute. In 1841, Thomas Richards took out administration to the effects of his brother Evan, who sold such right to the premises as he thereby acquired, for 10*l*. It has been contended that the effect of the statute is, not to make this a void conveyance, but only to deter parties, by means of a penalty, from entering into such transactions. If that had been the only effect of the statute, there would undoubtedly be nothing to interfere with the plaintiff's right to recover in this action. It seems to me, however, on the authorities, that the act has a much wider extent. The course of the common law was well known at the time, and the statute was not intended to alter it, but merely to superadd a penalty. The authority cited from Plowden seems quite decisive. He says, p. 88: "I take the statute, that, if he who

is out of possession bargains or sells or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells, or promises have a good and true right or title or not: and in this point the statute has not altered the law; for, the common law, before this statute, was, that he who was out of possession might not bargain, grant, or let his right or title, and, if he had done it, it should have been void. Then, this
 *725] statute was made in affirmance of the common law, *and not in alteration of it; and all that the statute has done, is, it has added a greater penalty to that which was contrary to the common law before, viz., that a man shall forfeit the value of the thing bargained or promised, &c., and to avoid such bargains or promises, where a man is out of possession, is the only point which the statute here remedies." Nothing can be more distinct than this: and the passages cited from Co. Litt. and Shepard's Touchstone are to the same effect. It seems to me, by analogy to all the cases which prohibits parties from maintaining actions in respect of contracts that are entered into in violation of the provisions of acts of parliament, that here, the lessor of the plaintiff is precluded from coming into court to assert the validity of a conveyance which the statute has expressly prohibited. I therefore think the rule for entering a verdict for the defendant should be made absolute.

COLTMAN, J. It seems to me also that the effect of the statute 32 H. 8, c. 9, is, to make the conveyance in question void. The argument of my brother *Channell* hardly arises on the facts. If Jenkin Richards had been tenant to Evan, possibly the tenancy would be considered as still subsisting. The only evidence, however, is, that Jenkin was living with his brother Evan upon some part of the premises: there was no proof of any tenancy. And, when Jenkin afterwards devised the property, and the devisee entered, there was nothing to connect him, in privity of title, with Evan. He is to be looked upon as a mere stranger. If that be so, the case falls precisely within the provisions of the statute. With respect to the argument—that an administrator who sells a right that comes to him in his representative character, is not within the statute—no case has been cited in support of it; and it seems to me to be equally destitute of foundation in reason.

*726] *MAULE, J. I also am of opinion that this case is exactly within the mischief which the legislature, in the time of Henry 8, thought one that ought to be provided against. That mischief was, that individuals possessed of rights, real or pretended, transferred them to persons more able, or more disposed, than themselves, to litigate them. This was considered to be a great evil; and, in order to remedy it, the statute declares that "no person shall bargain, buy, or sell, or by any ways or means obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons in or to any manors, lands, tenements, or hereditaments, (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their

ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made,) upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, to forfeit the whole value of the lands, tenements, or hereditaments so bargained, sold, promised, covenanted, or granted, contrary to the form of this act; and the buyer and taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments so by him bought or taken as is above said." It has been said that the statute does not apply to a case of this kind, the subject-matter of sale here being a present right of possession; and that the statute does not, in terms, avoid the conveyance. But I think the statute must be so construed as to prevent the mischief at which it was aimed; and that, as Mr. Protheroe bought a right to turn the defendant out of possession, and has sought, by an action of ejectment, to turn him out, the case is clearly within the purview of the act. It is unnecessary to *determine whether the statute, or the common law, [*727 makes transactions such as these void, under all possible combinations of circumstances. There can be no doubt that conveyances of titles are made void to the extent that is necessary to prevent the mischief which the act intended to remedy. The title in this case was purchased for 10*l*. Unless, therefore, the conveyance was avoided, the purchaser would only lose the sum he paid, and the seller would forfeit the value of the whole estate—a very unlikely construction. It seems to me, therefore, that there is good reason for holding the case to be within the terms of the statute, and that the statute (and the common law also) does avoid the conveyance. The supposed analogy between an assignee and an administrator, appears to me to fail.^(a) The administrator is not, as it seems to me, to be in a better situation than any other person; but rather worse; for, the very act of taking out letters of administration may be, as in this case it was, part of the illegal transaction.

CRESSWELL, J. I also think the rule to enter a verdict for the defendant in this case, must be made absolute. It is clear that Mr. Protheroe has no title, unless he can rely on the assignment from Thomas Richards to himself; and it is equally clear that that was a purchase of a pretended title, as explained by Plowden. It is impossible to refer the possession of Jenkin to the title of Thomas Richards. Jenkin claimed to deal with the property as his own; and the defendant entered, claiming under the devise to him by Jenkin. It seems to me, therefore, that the case falls within the first description *in the act, and not within any part of the exception. [*728 The assignment by Thomas Jenkin passed nothing, therefore, to Protheroe, and, consequently, he has made out no title in his lessee to maintain this action.

Rule absolute.

^(a) An executor or administrator is not necessarily in the position of an assignee in respect of any surplus beyond the assets required to pay the debts.

BROOME v. GOSDEN. *May 26.*

A declaration for a libel stated that on a certain night, a gentleman was hounded and robbed in a public-house kept by the plaintiff—*innuendo*, “that a person had been feloniously dragged and robbed in the said public-house of the plaintiff, and thereby intending to cause it to be believed that the said public-house of the plaintiff was the resort of, and frequented by felons, thieves, and depraved and bad characters.” The jury having returned a verdict for the defendant, notwithstanding that witnesses called for the plaintiff stated that they had ceased to frequent the plaintiff’s house in consequence of the publication, and that they understood the libel as an imputation upon the plaintiff and upon the character and conduct of his house—the court refused to grant a rule for a new trial.

CASE, for a libel. The declaration stated that the plaintiff, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, and from thence continually, had been, and still was, a licensed victualler and publican, and had always used, exercised, and carried on, and still did use, exercise, and carry on his said trade and business in and upon a certain house and premises called the Rising Sun, situate and being in Air Street, Piccadilly, in the county of Middlesex, with integrity, honesty, and propriety of conduct, nor were the said house and premises called the Rising Sun, before and at the time of the grievance by the defendant as thereafter mentioned, and during the occupancy thereof and carrying on therein by the plaintiff of his said trade or business as aforesaid, the resort of, or used or frequented by felons or thieves or depraved or bad characters: that, before, &c., the word “hoccussed” was and is commonly and
 *729] vulgarly *used for the purpose of expressing and meaning, and the said last-mentioned word was used by the defendant as thereafter mentioned, and was by divers persons, to wit, all the persons to whom the libel thereafter mentioned was published, understood as expressing and meaning, the improper and felonious mixture of drugs or other articles or ingredients calculated to produce stupefaction and senselessness, with spirits, beer, or other usual drinks, in order that those partaking of such drinks may thereby be speedily rendered insensible and thrown into a state of stupor, and, while in that state, feloniously robbed and plundered; and the defendant, contriving and wickedly and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed that the plaintiff did not conduct and carry on his said trade or business of a licensed victualler and publican at the said house and premises called the Rising Sun as aforesaid, with integrity, honesty, and propriety of conduct, and also to cause it to be suspected and believed that the said house and premises were, during the said occupancy thereof by the plaintiff as aforesaid, the resort of, and frequented by felons, thieves, and depraved and bad characters, and to vex, &c., and wholly to ruin the plaintiff in his said trade and business, theretofore, to wit, on, &c., did falsely, wickedly, and maliciously publish, and cause and procure to be published, in a certain newspaper called *The Era*, of and concerning the plaintiff, and of and concerning the plaintiff in his said trade and business of a licensed victualler and publican as aforesaid, a

certain false, scandalous, and defamatory libel, containing (among other things) the false, scandalous, defamatory, and libellous matter following, of and concerning the plaintiff, and of and concerning the plaintiff in his said trade and business of a licensed victualler and publican as aforesaid, that is to say, &c. The libel, which was set out with innuendoes, consisted of a description of a journey to an intended prize-fight, in reference to which the plaintiff was alleged to have acted improperly; and it contained this passage—"His (thereby meaning the plaintiff's) disgraceful affair with George Morley, and several other shameful ones, are not to be forgotten,"—and concluded with the following remarks relative to the plaintiff's public-house:—"Where, by the by, that same night, a gentleman was hocused and robbed of 40*l.*, (then using the said word or expression 'hocused' in the sense hereinbefore mentioned, meaning thereby that a person had been feloniously drugged and robbed in the said public-house of the plaintiff, and thereby intending to cause it to be believed that the said public-house of the plaintiff was the resort of and frequented by felons, thieves, and depraved and bad characters:)" by means of the committing of which grievances the plaintiff had been and was greatly injured in his said trade and business, and by means of the premises one E. F., one I. K., and divers other persons, who had, before the committing of the said grievances by the defendant, been used and accustomed to deal with, and be customers of the plaintiff in his said trade and business, and in the way of his said trade and business to resort to and use and frequent and become guests of the plaintiff in the said house and premises of the plaintiff in and upon which the said trade and business was so exercised and carried on as aforesaid, for profit and reward to the plaintiff in that behalf, had, since the committing of the said grievances, hitherto respectively refused so to do, and had thence continually discontinued dealing with the plaintiff in his said trade and business, and further resorting to, using, or frequenting, or becoming guests of the plaintiff in the said house and premises; and thereby the plaintiff had lost and been deprived of divers gains and profits which would otherwise have accrued to him in his said trade or business, and was and is otherwise greatly injured. [730]

The defendant, except as to the following part of the supposed libel—"His disgraceful affair with George Morley, and several other shameful ones, are not to be forgotten"—pleaded not guilty; whereupon issue was joined.

At the trial before ERLE, J., at the sittings at Westminster after the last term, several witnesses called on the part of the plaintiff stated, that, in consequence of the publication of the libel, they had discontinued to frequent the plaintiff's house, not thinking it a safe place to go to; and that they understood the libel as an imputation upon the plaintiff, and upon the character and conduct of his house.

The jury having found the issue for the defendant, and assessed the damages upon the part of the declaration that was confessed, at one shilling

Shee, Serjt., on the part of the plaintiff, now moved for a new trial, on the ground that the conclusion to which the jury came was not warranted by the evidence.

TINDAL, C. J. The only question in this case is, whether we can see that the jury have done manifestly wrong in not finding the alleged libel to bear the meaning that the plaintiff has thought fit to put upon it by the innuendo. That part which is relied on, states that on a certain night a gentleman was hocussed and robbed of 40*l.* in the plaintiff's house; and the innuendo is—"then using the said word or expression 'hocussed' in the sense hereinbefore mentioned, meaning thereby that a person had been feloniously drugged and robbed in the said public-house of the plaintiff, and thereby intending to cause it to be believed that the said public-house of *732] the plaintiff was the resort of, and frequented *by, felons, thieves, and depraved and bad characters." That innuendo takes a much wider range and extent than the words of the libel fairly warrant, turning that which may have been an accidental occurrence, into habitual misconduct and negligence on the part of the keeper of the house. I see no sufficient reason for finding fault with the conclusion to which the jury have come.

COLTMAN, J., concurred.

MAULE, J. The libel does not necessarily impute misconduct to the plaintiff; and the jury were not bound to adopt the opinions of the witnesses.

CRESSWELL, J. The jury thought, and they were justified in thinking, that the words of the libel did not fairly bear the meaning imputed to them by the innuendo.

Rule refused. (a)

(a) The proper office of an innuendo (which must not, however, introduce new matter, 1 Wms. Saund. 243) would seem to be, to fix the meaning of an ambiguous expression, or to mark that an expression is used in a different sense from that which it would *prima facie* import. Whether the expression has been so used on the particular occasion, is a question of fact for the jury. In this case, the innuendo (if it may be so called) consists of two branches; the first of which is introduced for the purpose of explaining the meaning of an English word used in that which appears to be its only sense, and of the import of which, therefore, the court is bound to take notice. The plaintiff might, it is conceived, have called upon the learned judge to say whether the term used was capable of more than one construction, and, if it was not, to tell the jury, *as a matter of law*, that the charge that a party had been "hocussed" in the plaintiff's house, was, or that it was not, libellous.

The second branch of the explanatory clause or innuendo merely states the object with which the alleged libellous expression was used.

*HARLOW v. READ. May 26.

[*733]

By a judge's order, a cause was referred to A., B., and C., the award to be made by them or any two of them, and it was provided that the arbitrators, or any two of them, should, as to certain work, adopt the opinion or decision of C., and, as to certain other work, the opinion or decision of A. and B., or, in case A. and B. should differ in opinion, then that the arbitrators, or such two of them, as should make an award, should adopt the opinion or decision, as to such last-mentioned work, of an umpire to be nominated by A. and B. before proceeding with the reference. A. and B. appointed an umpire, and afterwards made an award, in which they recited that they had heard and duly considered the allegations and evidence of the parties, *and had considered the decision of the said umpire*. There had, in fact, been no difference of opinion on the part of A. and B., and no opinion or decision had been required of, or given by, the umpire:—

Held, that the introduction of these words did not vitiate the award.

By a judge's order, bearing date the 31st of December, 1844, all matters in difference between the parties in this cause were referred to the award, certificate, order, final end, and determination of Henry Gibb and Robert Crickmer, engineers, and John Kelsey, builder, so as they, the said arbitrators, or any two of them, should make and publish their award or certificate in writing of and concerning the matters referred, ready to be delivered to the parties in difference, or such of them as should require the same, on or before the 8th of February then next ensuing, or such further time as the said arbitrators, or any two of them, should, by endorsement on the order, appoint: and it was, amongst other things, further ordered "that the said arbitrators, or any of them, should, as to the carpenters', builders', and joiners' work, adopt the opinion or decision of Kelsey, and, as to the machinery and other work, the opinion or decision of Gibb and Crickmer, or, in case Gibb and Crickmer should differ in opinion, then that the said arbitrators, or such two of them as should make an award or certificate, should adopt the opinion or decision, as to such other work and machinery, of an umpire to be nominated by Gibb and Crickmer, before proceeding with the said reference, by *a memorandum in writing to be endorsed on the order, and should make their award or certificate accordingly. [*734]

The arbitrators Gibb and Crickmer, by their award, dated the 25th of March, 1845, after reciting that the time for making the award had been duly enlarged, and that they had, before proceeding with the said reference, by an endorsement on the order, in writing, under their hands, nominated and appointed Joseph Ames, engineer, to be an umpire between the said Gibb and Crickmer,—to decide as to the work and machinery except the carpenters', builders', and joiners' work, referred for their opinion or decision by the said order,—in case they the said Gibb and Crickmer should differ in their opinion thereon, proceeded thus:—"Now, we, the said Henry Gibb, Robert Crickmer, and John Kelsey, having taken upon ourselves the burden of the said arbitration, and having heard, and duly considered, all the allegations and evidence of the said respective parties of and concerning the matters in difference so referred as aforesaid, *and considered the decision*

of the said umpire, do make and publish this our award in writing of and concerning the said matters in difference so referred, and do hereby award, order, determine, and direct," &c. &c.

Talfourd, Serjt., on the behalf of the plaintiff, in Easter term last, obtained a rule nisi to set aside the award, on the grounds—first, that the arbitrators had exceeded their authority, in taking into their consideration matters not referred to them; secondly, that they professed to have decided certain of the matters upon the opinion of one whom they had, in fact, never consulted. The affidavit as to the latter point—that of the plaintiff—stated, that, after the making of the award, he saw Ames, the umpire, and inquired of him whether he had examined an engine and machinery belonging to the deponent, as an umpire in an arbitration between *the
*735] deponent and Read, and whether he had given any opinion or decision as to the charges thereon or price thereof; and that Ames then informed the deponent that he had not been consulted or spoken to by any person, and that he had not in any way interfered in the matter of the said award.

Glover, Serjt., now showed cause, upon affidavits which negatived the allegations in the affidavits filed in support of the rule, as to the supposed excess of jurisdiction. The first ground of objection is removed by the affidavits made in answer to the rule. As to the second ground—the province of the umpire does not commence until the arbitrators have differed, which does not appear to have been the case here. [MAULE, J. The arbitrators erroneously state in their award that they have considered the decision of the umpire, when in point of fact they do not appear to have differed, or to have consulted the umpire at all. If they had consulted Ames, they would have done something unnecessary.]

Talfourd, Serjt., in support of his rule. No answer is given to the second objection. The award is clearly bad, inasmuch as the arbitrators have chosen improperly to found it upon the supposed opinion and decision of Ames, the umpire; whom, it appears, they have never consulted, and who has expressed no opinion on the subject-matter of the reference.

TINDAL, C. J. The first matter of objection having been removed by the affidavits sworn in answer to the rule, the only ground upon which it is now contended that this award ought to be set aside is, that the arbitrators, by whom it is made, falsely allege therein that they have taken the advice
*736] of the umpire; whereas, in truth, they have never consulted him at all. And, undoubtedly, if the award had so stated, it would have been bad. But the award does not so state: it merely states that the arbitrators, having heard and duly considered all the allegations and evidence of the respective parties of and concerning the matters in difference referred, *and considered the decision of the umpire*, do award so and so. There having been no difference of opinion on the part of the arbitrators, there was no necessity for consulting the umpire, and no necessity for, or right in, him to come to any decision. I therefore think we are justified in

treating the introduction of those words as a mere mistake, which does not vitiate the award.

The rest of the court concurred. Rule discharged, without costs.(a)

(a) And see *Hoe's case*, 5 Co. Rep. 89, third resolution; *Anon.* 1 Bulstr. 184; *Souleby v. Hodgson*, 3 Burr. 1474, 1 W. Bl. 463; *Rex v. Joseph Malden*, 4 Burr. 2135, 2136; *Hall v. Lawrence*, 4 T. R. 589; *Beck v. Sargent*, 4 Taunt. 232; *Sprigens v. Nash*, 5 M. & S. 193; *Tollit v. Saunders*, 9 Price, 612; *Bates v. Cooke*, 9 B. & C. 407; *Tunno, In re*, 5 B. & Ad. 488, 494, 2 Nev. & Mann. 328; *Potter v. Newman*, Tyrwh. & Gr. 29, 2 C., M. & R. 742, 4 Dowl. P. C. 504; *Parbery v. Newnham*, 7 M. & W. 378; *Salkeld and Another, In re*, 12 Ad. & B. 767, 4 Perr. & Dav. 732.

*WILKES v. HOPKINS, NICHOLS, and FRANCIS BISHOP. [*737 May 27.

In an action on a bill of exchange alleged to have been accepted by the defendants under the style and firm of A. & Co., an order was made by consent, to admit the handwriting of the acceptance.

The notice to admit was as follows:—"Bill of exchange for 121*l.* 10*s.* drawn by the plaintiff, upon and directed to the defendants as A. & Co., and accepted by B. for the defendants as A. & Co., payable, &c.: and endorsed, &c."—*Held*, that this admission precluded the defendants from denying the authority of B. to bind the firm of A. & Co. by such acceptance, and was not a mere admission that he signed an acceptance purporting to bind that firm.

ASSUMPSIT. The first count of the declaration was a special count for not indemnifying the plaintiff in respect of a bill of exchange for 121*l.* 10*s.*, drawn by him for the accommodation of the defendants, and directed to them as "The Newbridge Coal Company." The second count charged the defendants as the acceptors of a bill (being, in fact, the same) for 121*l.* 10*s.*, drawn by the plaintiff and directed to the defendants by the style and firm of "The Newbridge Coal Company." The third charged them as the drawers of a bill for 62*l.* 13*s.*, directed to and accepted by one Francis Bishop. There was also a count for money lent.

The defendants Hopkins and Nichols, amongst other pleas, traversed the acceptance and the drawing of the bills in the declaration mentioned, and pleaded non assumpsit to the count for money lent. Francis Bishop suffered judgment by default, and died before the trial.

The cause was tried before TINDAL, C. J., at the last summer assizes at Gloucester. It appeared that the defendants, Hopkins, Nichols, and Francis Bishop, were jointly interested with William Bishop, Henry Bishop, Oliver James, Thomas Powell, and Thomas Atkinson, in a colliery in the Forest of Dean, the business of which was managed by William and Henry Bishop, by and under the name of "The Newbridge Coal Company." In order to sustain the counts upon the bills, the plaintiff put in the bills, and then offered in evidence a summons and order (made by consent) to admit the drawing and acceptance, under the 20th rule of Hilary term, 4 W. 4. [*738]

In the notice the two bills were thus described:—

"1. Bill of exchange drawn for the sum of 121*l.* 10*s.*, by the plaintiff,

upon and directed to [the above-named defendants as] The Newbridge Coal Company, Forest of Dean, Gloucestershire, and accepted by one Henry Bishop, for [the defendants as] The Newbridge Coal Company, payable at Messrs. Jones, Lloyd, & Co.'s, bankers, London, payable two months after date, and endorsed by plaintiff and William Russell Sker for Gloucestershire Banking Company. Date, 20 June, 1835.

"2. Bill of exchange for 62*l.* 13*s.*, drawn by one William Bishop for [the defendants as] The Newbridge Coal Company, upon, and accepted by, the defendant Francis Bishop, and directed to him as a corn-merchant, Gloucester, payable at Spooner, Attwood, & Co.'s, bankers, London, two months after date, and endorsed by the said William Bishop for [the defendants as] The Newbridge Coal Company; also by one Henry Bishop and the plaintiff. Date, 12 August, 1835."

On the part of the defendants Hopkins and Nichols, it was objected, that one of several partners in a *mining* concern has no *implied* authority, by law, to accept or draw bills on behalf of the concern, and that there was no evidence that Henry Bishop or William Bishop had any *express* authority so to bind their co-owners.

For the plaintiff, it was insisted that the defendants were precluded, by the form of the admission above set out, from denying the authority.

His lordship was of this opinion; and, under his direction, the jury returned a verdict for the plaintiff, damages 272*l.*

*739] **Byles*, Serjt., in Michaelmas term last, obtained a rule nisi for a new trial, on the ground that an improper effect had been given to the defendants' admissions; and also upon an affidavit of the defendants' attorney, who swore that the action was defended on the sole ground of there being no authority, express or implied, in Henry Bishop or William Bishop, to draw, accept, or endorse any bills of exchange so as to bind the defendants as joint owners in the colliery; that, until after the trial commenced, he was quite unaware, that, by the admissions he had entered into, he had at all prejudiced such defence; that the admissions so made by him in reference to the bills in the first, second, and third counts mentioned, were so made by him upon the sole belief that by making such admissions he was admitting only the handwriting of the several parties whose handwriting appeared on the said bills, but no further or otherwise, and not intending to recognise or admit the authority of the drawer, acceptor, or endorser of either of the said bills to bind the defendants; that, on the contrary, the *sole* ground of defence intended to be set up by the defendant Hopkins to the claim of the plaintiff, went to deny, and did deny, any authority, express or implied, by or on the part of the defendant Hopkins to the drawer, acceptor, and endorser of such bills, to draw, accept, or endorse the same, or either of them, in the name of The Newbridge Coal Company, or in the name of the defendants as forming part of such company.

Talfourd and *Channell*, Serjts., (with whom were *Godson* and *W. J. Alexander*.) in Easter term, showed cause. As a general principle, it may be

conceded that one partner in a mining company cannot bind the others, without express authority, by the acceptance or *endorsement of bills: *Dickenson v. Valpy*, 5 Mann. & R. 126, 10 B. & C. 128; [*740 *Bramah v. Roberts*, 3 New Cases, 963, 5 Scott, 172; *Tredwin v. Bourne*, 6 M. & W. 461; *Hawlayne v. Bourne*, 7 M. & W. 595. The authority, however, of Henry Bishop and William Bishop is in this case admitted. It is admitted that the defendants form part of the company called the Newbridge Coal Company; that they were, as The Newbridge Coal Company, the drawers of the bill in the first count mentioned, and that it was accepted by Henry Bishop for them in that character. Unless, therefore, the admission amounts to an admission of Henry Bishop's authority, it is perfectly idle. [CRESSWELL, J. Does the admission amount to more than this, that Henry Bishop assumed to accept, and William Bishop to draw, the bills in question for The Newbridge Coal Company? If it were meant to have the force now suggested, should it not have been "accepted by the defendants by the hand of Henry Bishop," &c.? The object of the rule was, to save the expense of the mere proof of handwriting.] In *Doe d. Wright v. Smith*, 2 M. & Rob. 7, the defendant, under a judge's order, admitted the execution of a document which was described in the notice as "the *counterpart* of a lease from E. T. to the defendant, dated," &c.: upon the document being put as in a counterpart, it appeared to be stamped with a 1*l.* 10*s.* stamp, and to have been executed *by both parties*, whereupon it was objected that it was inadmissible, being an original lease, and not a counterpart, (a) and therefore (the rent being above 100*l.*) requiring a 2*l.* stamp. For the plaintiff it was submitted that the defendant was precluded, by his admission, from saying that the instrument was other than a counterpart: on *the other hand it was insisted that all that was admitted under the [*741 order was, that the defendant executed the instrument produced when the order was made. But Lord DENMAN ruled that the defendant, having consented to admit it as a counterpart, was precluded from taking the objection: and the plaintiff had a verdict.

Byles, Serjt., (with whom was *Gray*,) in support of the rule. It is quite clear that the joint proprietors of this mine or gale were not partners in a trading concern, so as impliedly to authorize one or more of them to bind the whole, by their acceptance or endorsement of bills of exchange—*Chitty on Bills*, 46 a, 9th edit.; *Hedley v. Bainbridge*, 3 Q. B. 316, 2 Gale & D. 483; *Kirk v. Blurton*, 9 M. & W. 284. And the admissions made under the judge's order do not amount to an admission of an *express* authority. These admissions were made under the 20th rule of Hilary term, 4 W. 4, a rule pronounced by the judges pursuant to the statute 3 & 4 W. 4, c. 42, s. 15. The object of the statute and the rule was, to remedy the enormous abuses that existed under the old system, and to prevent the useless expense of calling witnesses for the mere purpose of proving the signing and execution of written documents. This clearly appears from the statute itself,

(a) See *vide* 3 Mann. & Gr. p. 518 b.

which, reciting "that it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes," enacts "that it shall and may be lawful for the judges, or any such eight or more of them as aforesaid, (a) at any time within five years after this act shall take effect, to make regulations, by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an *742] application for that purpose at a reasonable time before *the trial, of one party to the other, of all such written or printed documents, or copies of documents, as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such document or copies for the purpose of obtaining admission thereof, as the case may be, and as to the said judges shall seem meet; and all such rules and orders shall be binding and obligatory in all courts of common law, and of the like force as if the provisions therein contained had been expressly enacted by parliament." And the 20th rule, which was framed for the purpose of carrying out that provision, declares that "either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form thereto annexed, marked A., or to the like effect, of his intention to adduce certain written or printed documents; and, unless the adverse party shall consent, by endorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof. And, unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his endorsement thereon, shall be paid by the party so required, whatever may be the result of the cause." And the notice intimates to the party the *743] nature of the document, and that he will be "required *to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed *as they purport respectively to have been*, &c., saving all just exceptions to the admissibility of all such documents as evidence in the cause." It is impossible that any person reading that notice could imagine that it was designed for any other purpose than to prevent the expense of the mere formal proof of handwriting, signature, or execution. And it is to be observed that these admissions are *conclusive*, and irrevocable—*Langley v. The Earl of Oxford*, 1 M. & W. 508; *Doe d. Wetherell v. Bird*, 7 C. & P. 6; *Elton v. Larkins*, 1 M. & Rob. 196. The admission that the bill in the first count mentioned was accepted by *Henry*

Bishop "for the defendants as The Newbridge Coal Company," means no more than that Henry Bishop in fact signed the bill as the acceptor, *professing* to do so for the company. Suppose the defendants had declined to consent to the terms of the admission, what costs would they have been liable for under the rule? Clearly, the costs of proving the handwriting of Henry Bishop only, and not the chain of facts necessary to prove that he was authorized to accept bills for and on behalf of the company. An admission of a will does not preclude the party from showing that the testator was not in a sane state when he executed it. [ERLE, J. Suppose such an admission as this to have been entered into before the rule of Hilary term, 4 W. 4, would it not have amounted to an admission that Henry Bishop accepted the bill for the defendants? It is submitted that it would not, but that it would merely have amounted to an admission that the acceptance was in the handwriting of Henry Bishop, and that he thereby meant to bind the defendants, and not to an admission of his authority to bind them.

Cur. adv. vult.

*TINDAL, C. J., now delivered the judgment of the court.

[*744

This was an action upon a bill of exchange drawn by the plaintiff on "The Newbridge Coal Company, Forest of Dean, Gloucestershire," and accepted "at Messrs. Jones, Lloyd, & Co.'s, for the Newbridge Coal Company, Henry Bishop." The defendants pleaded, amongst other pleas, that they did not accept; and, at the trial before me at the last summer assizes for the county of Gloucester, it was objected on the part of the defendants, that there was no evidence that Henry Bishop, who had signed the acceptance, had any authority to accept for them. On the part of the plaintiff, however, it was contended, that, by the form of the admission entered into by the defendants, they were precluded from taking this objection; which appeared to me to be the case. And the question which has been argued before us, on a motion for a new trial, has been, whether the bill of exchange was properly admitted in evidence.

The admission was given under a judge's order, drawn up in the usual form, under the general rule of Hilary term, 4 W. 4, No. 20: and the argument on the part of the defendants before us has been, that admissions given under such order, do, by the very language of the order, bind the party to admit at the trial no more than that the documents therein specified to be originals are written, signed, and executed, "as they purport respectively to have been;" and that, as the bill of exchange, when produced, purports to be drawn by the plaintiff on The Newbridge Coal Company, and to be accepted for The Newbridge Coal Company, by Henry Bishop, so, nothing more is admitted than that the acceptance for The Newbridge Coal Company is in the handwriting of Henry Bishop, but that there is neither an admission that the defendants are the persons who constitute The Newbridge Coal Company, nor that Henry Bishop *had
any authority from them to accept bills on their behalf. [*745

How far this might have been the case, if the bill had been set out in

the notice to admit, in the precise terms in which it purports to have been drawn; that is, if it had been described as a bill drawn on The Newbridge Coal Company, and to have been accepted for The Newbridge Coal Company, by Henry Bishop, we are not called upon to determine; for, in this case, the bill is described in the notice to admit, as a bill "drawn upon and directed to the above-named defendants, as the The Newbridge Coal Company," and to be "accepted by one Henry Bishop for the defendants as The Newbridge Coal Company, payable at Messrs. Jones, Lloyd, & Co's., bankers, London." So that the facts, that the defendants constitute The Newbridge Coal Company, that the bill is accepted by Henry Bishop for the defendants, and that it is payable at a London banker's—three facts not appearing on the face of the bill—are plainly and unequivocally admitted under this notice.

A defendant undoubtedly may, if he thinks proper, bind himself by the form of his admissions more largely than he would be called upon to do under an ordinary notice to admit; and this, we think, the defendants have done upon the present occasion; and that it would be giving them an unfair advantage, after an admission in these terms, which imports, in its natural and ordinary sense, that Bishop had authority to accept for the defendants, if they should be allowed at the trial to set up the want of such authority.

As, however, we see reason to believe, from the affidavits, that the defendants were themselves taken by surprise by the extent to which their admission has been carried, and as they allege themselves to have been prevented thereby from entering into their real defence at the trial, we think *746] it reasonable that there should be an opportunity of new-modelling their admission, and that a new trial should be granted, on payment of costs by the defendants. Rule absolute accordingly.(a)

(a) The order was afterwards amended by striking out the words within brackets: *vide ante*, p. 738.

DAVIES v. Sir ARTHUR INGRAM ASTON, Knight. May 28.

To a count in trover for converting cattle and goods, to wit, beasts of the plough, implements of husbandry, books, bedsteads, &c., the defendant pleaded a justification of the seizure as a distress for rent. The plaintiff replied, that he was a husbandman, and that the goods mentioned in the count were beasts of the plough, and implements of husbandry, there being other available distress upon the premises at the time:—*Held*, bad on special demurrer, inasmuch as it professed to answer the whole of the plea, which plea embraced all the articles enumerated (under a *videlicet*) in the count, some of which were not implements of husbandry.

CASE. The declaration contained counts for an excessive distress,—for distraining beasts of the plough, there being other available distress upon the premises,—for not selling the distress for the best price,—for extortionate charges for the expenses of distress and sale,—and for selling before the expiration of five days,—and a count in trover.

The goods in the first count were described, under a *videlicet*, as fifty tons of hay, one hundred quarters of corn, ten carts, ten horses, fifty cows, ten bulls, ten heifers, ten stirks, ten calves, thirty tables, thirty cheese-presses, &c., two hundred yards of carpet, fifty chairs, one thousand books, twenty bedsteads, twenty feather-beds, twenty mattresses, twenty bolsters, twenty pillows, twenty pairs of blankets, &c., &c., ten ploughs, ten harrows, six winnowing-machines, one hundred farming-tools, and one hundred farming-implements, of much greater value than the amount of the alleged arrears of rent, and the costs, expenses, and charges of the said distress, and of the appraisement and sale thereof, to wit, of the value of 2000*l*.

*In the last count the goods were described as follows :—" Certain other goods and chattels, to wit, goods and chattels of the same number, quantity, quality, description, and value as the goods and chattels in the first count mentioned." [747]

To the last count the defendant pleaded that he seized and took the goods in that count mentioned, as and for a distress for arrears of rent.

Replication, that, at the said time when, &c., in the last count mentioned, and at the time of the taking and levying the distress in the last plea mentioned, in manner and form as in that plea alleged, the plaintiff was a husbandman, and carried on and exercised the business and calling of husbandry, and that the goods and chattels in the last count mentioned were the cattle and beasts of the plough, and the implements of husbandry of the plaintiff, by him then used in and upon the last-mentioned lands, tenements, and premises, in and about his said business and calling, and wherewith respectively he gained, tilled, and cultivated the said lands, tenements, and premises in the last plea mentioned ; and that, at the time of taking and levying the goods and chattels in the last count mentioned as and for such distress as in the said last plea mentioned, there were in and upon the lands, tenements, and premises in the last plea mentioned, divers other goods and chattels, other than beasts of the plough, sheep, or growing crops of the plaintiff, then liable to be taken, and then presently available as a distress for, and sufficient to satisfy and discharge, the arrears of rent in the last plea mentioned, and the costs and charges of distraining for the same, and selling and disposing of such distress, and which last-mentioned goods and chattels the defendant then could and might have found, and then could and might and ought to have taken and distrained as and for such distress as in the last plea mentioned, instead of the goods and chattels in the last count mentioned—verification.

*Special demurrer, assigning for causes, amongst others, that the replication in the introductory part thereof, purported, and professed, to be an answer to the whole plea to the last count, and to support the whole of the said last count, whereas the last count complained of the said supposed conversion by the defendant of many things which could not possibly be either cattle and beasts of the plough, or implements of hus- [748]

bandry, such as beds, pillows, blankets, sheets, &c.; and as the plea to that count answered as to the whole of that count, the replication ought to have contained an answer which supported and showed the right of the plaintiff to maintain his action upon and in respect of the whole of that count, otherwise the plaintiff ought to have confined his replication to such only of the goods and chattels in the last count mentioned as might be and were cattle and beasts of the plough and implements of husbandry, and ought to have otherwise replied or entered a *nolle prosequi* as to the rest of the goods and chattels in the last count mentioned.

Joinder in demurrer.

Channell, Serjt., (with whom was *Welsby*,) in support of the demurrer, submitted that the objection specially pointed out by the demurrer was fatal to the replication.

Talfourd, Serjt., contra, submitted, that, inasmuch as the goods enumerated in the declaration being laid under a *videlicet*, the plaintiff would not be bound to prove more than the improper taking of a single article; so, in the replication, it was not necessary for him to confine himself to such of them as were beasts of the plough or implements of husbandry.^(a)

*749] TINDAL, C. J. I am of opinion that the replication in question is bad, as professing to answer the whole of the plea to the last count, whereas, in ordinary understanding, it must be taken to answer part only; for, it is impossible to say that many of the articles referred to in the sixth count, are either beasts of the plough or implements of husbandry.^(b) As, therefore, the plea to that count is unanswered, there must be judgment for the defendant thereon.

The rest of the court concurred.

Judgment for the defendant.

(a) The confession in a plea pleaded by way of confession and avoidance, admits no more than the plaintiff would be bound to prove, upon a traverse of the allegations in the declaration. The matter pleaded in justification, i. e., in avoidance, cannot be subject to a different construction. Here, upon a traverse of the allegations in the declaration, the plaintiff would only have been bound to prove the conversion of some articles, or of some one article, mentioned in the last count of the declaration. The defendant in this case appears, in effect, to say, "I admit having taken goods falling within some one or more of the descriptions contained in the last count of your declaration, and to the extent of that admission, I justify the taking as a distress." The plaintiff replies that the goods and chattels in the last count mentioned (that is, some goods coming within some one or more of the descriptions in the last count) were beasts of the plough, and implements of husbandry.

The question, whether the replication is good or bad, appears to depend upon whether the allegations in the last count bound the plaintiff to prove that some articles coming within each of the descriptions in that count, had been taken. If not, it is difficult to see why the replication does not afford a complete answer to the plea. If the insertion of the books, bedsteads, &c., though under a *videlicet*, had pledged the plaintiff to show that some books and some bedsteads had been converted by the defendant to his own use, the replication would have been bad on the ground of *departure*.

(b) If the replication is to be construed as alleging that books and bedsteads are implements of husbandry, is the truth of that allegation a question of law, for the court, or of fact, for a jury?

*FRANKLIN v. CARTER. May 28.

[*750]

To covenant for rent under an indenture, the defendant pleaded, as to 2*l.* 0*s.* 10*d.*, that, on the 5th of April, 1843, before any part of the rent became due, 2*l.* 0*s.* 10*d.*, being at the rate of 7*d.* for every 20*s.* of the annual value, was duly, and according to the form of the statute, assessed on the premises, in respect of the property thereof, for the year ensuing; that on the 28th of August, 1844, before the commencement of the suit, the defendant, then being occupier and tenant, paid to T. C. then being collector, the 2*l.* 0*s.* 10*d.*; and that the defendant had never made any payment on account of the rent since the payment of the 2*l.* 0*s.* 10*d.* :—*Held*, on general demurrer, that the plea sufficiently showed that the assessment was made under the property and income tax act, 5 & 6 Vict. c. 35, and that it answered that part of the demand to which it was pleaded.

The defendant also pleaded, in bar of the further maintenance of action, as to 52*l.* 10*s.*, other parcel of the rent, that the plaintiff held the premises on lease from A., subject to a proviso for re-entry by A. for breach of covenant; that on the 1st of January, 1844, before any part of that rent became due, the plaintiff incurred a forfeiture by breach of covenant; that, in consequence of such forfeiture, A. recovered in ejectment against the plaintiff; and that the defendant afterwards paid A. 52*l.* 10*s.*, for the profits from the day of the demise in the declaration (1st of January, 1844):—*Held*, that the plea disclosed a substantial answer as to the 52*l.* 10*s.*, *argumentativeness* not being pointed out as a ground of demurrer.

COVENANT, for four quarters' rent, the last quarter due on the 29th of September, 1844, under an indenture of lease reserving 70*l.* a year "free from all rates, taxes, charges, duties, and assessments."

First plea—as to 2*l.* 0*s.* 10*d.*, parcel of the 70*l.* in the declaration mentioned as due and in arrear to the plaintiff—that, after the making of the indenture, and whilst the defendant held the said tenements thereunder as tenant thereof to the plaintiff, and whilst the plaintiff was entitled to the annual sum of 70*l.* reserved by the said indenture, and before any part of the rent in the declaration mentioned had accrued due, to wit, on the 5th of April, 1843, a large sum of money, to wit, 2*l.* 0*s.* 10*d.*, being at and after the rate of 7*d.* for every 20*s.* of the annual value, to wit, 70*l.*, of the said messuage, &c., was duly, and according to the form of the statute in such case made, assessed on the said messuage, &c., in respect of the property thereof, for the year next ensuing, which sum of 2*l.* 0*s.* 10*d.* [*751] was payable by four quarterly instalments, that is to say, on the 20th of June, &c., then next ensuing; that afterwards, and before the commencement of the suit, to wit, on the 28th of August, 1844, the defendant, then being the occupier and tenant of the said messuage, &c., paid to Thomas Casey, then being the collector of the said tax, the said sum of 2*l.* 0*s.* 10*d.*; which sum of 2*l.* 0*s.* 10*d.* so paid by the defendant, was and is 7*d.* for every 20*s.* of the said sum of 70*l.*, the annual rent payable by the defendant to the plaintiff, under and by virtue of the said indenture, for the said messuage, &c.; and that the defendant had never made any payment to the plaintiff on account of the rent of the said messuage, &c., since the payment of the said sum of 2*l.* 0*s.* 10*d.*—Verification.

To this plea there was a general demurrer.

Second plea—as to 52*l.* 10*s.*, parcel of the 70*l.* in the declaration mentioned, being the rent which was alleged to have accrued due on the 25th of March, the 24th of June, and the 29th of September, 1844, and all

damages and causes of action in respect thereof—that the plaintiff ought not further to maintain his action thereof, because, before and at the time of making the indenture in the declaration mentioned, to wit, on the 14th of August, 1820, R. J. Smith was lawfully possessed for a term of years, whereof upwards of fifty-three and a half years, wanting twenty-one days, from the 24th of June, were to come and unexpired, of and in the said messuage, &c., in the declaration mentioned, and, being so seised thereof, before making the said indenture, to wit, on the said 14th of August, in the year last aforesaid, by a certain indenture then made between the said R. J. Smith of the one part, and the plaintiff of the other part, the said R. J. Smith did demise and lease the said messuage, &c., with the appurtenances, *752] in the declaration mentioned, unto the plaintiff, his executors, administrators and assigns: to have and to hold the same unto the plaintiff, his executors, &c., from the 24th of June then last, for and during the term of fifty-three years and a half, wanting twenty-one days, from thence next ensuing; and the plaintiff did in and by the last-mentioned indenture, amongst other things, covenant with the said R. J. Smith, that he the said R. J. Smith, his heirs, executors, administrators, and assigns, should and would, from time to time, and at all times during the term thereby granted, at his and their own proper costs and charges, well and sufficiently repair, uphold, &c.; and also that the plaintiff, his executors, &c., should and would, from time to time, and at all times during the said term thereby granted, insure or cause to be insured the said messuage, &c., and every part thereof, in the Albion Fire Office, in London, to the full amount of the value thereof; and that, in and by the last-mentioned indenture, it was and is afterwards provided, and the last-mentioned indenture was declared to be upon the express condition, that, if the plaintiff, his executors, &c., should not in and by all things well and sufficiently observe, perform, fulfil, and keep all and singular the covenants, clauses, articles, conditions, and agreements in the said last-mentioned indenture before contained, which on his and their part and behalf were and ought to be observed, &c., according to the true intent and meaning of the said indenture, then and from thenceforth, and in either of the said cases, it should and might be lawful for the said R. J. Smith, into and upon the said messuage, &c., wholly to re-enter, and the same to have again, retain, repossess, and enjoy as in his and their first and former estate, and the plaintiff, his executors, &c., and all other occupiers, thereout and thence utterly to expel, put out, and amove, the same indenture, or any thing thereinbefore contained, to the *753] contrary in any wise notwithstanding: that, after the making of the last-mentioned indenture, and before the making of the indenture in the declaration mentioned, to wit, on the 14th of August, 1820, Franklin entered into the said messuage, &c., and became and was possessed thereof under and by virtue of the said indenture between the said R. J. Smith and Franklin, for the term of the same indenture granted, and was so thereof possessed at the time of the making of the indenture in the

declaration mentioned; that afterwards, and before any part of the rent in the introductory part of that plea mentioned, accrued due and in arrear, to wit, on the 1st of January, 1844, Franklin did not nor would, on the day and year last aforesaid, insure or cause to be insured the said messuage, &c., in the said fire-office, but wholly neglected so to do, and the same was, on the day and year last aforesaid, wholly uninsured in the said fire-office, contrary to the form and effect of the said covenant in that behalf: that, by means of the premises, after the making of the said indenture, and before any part of the said sum of 52*l.* 10*s.*, parcel, &c., became due and payable, to wit, on the 1st of January, 1844, the estate, term, and interest of Franklin in the demised messuage became and were ended, forfeited, and determined: (a) that, *by reason and in consequence of the said forfeiture*, John Doe, on the demise of the said R. J. Smith, afterwards, to wit, in Hilary term, 7 Vict., commenced an action of trespass and ejectment in the court of Queen's Bench at Westminster: that to this action (b) Franklin afterwards, in Easter term, in the year last aforesaid, duly appeared in the said court to defend the same as the landlord of the said messuage, &c., and pleaded thereto: (b) that thereupon, to wit, in *Hilary term, in [754 the year last aforesaid, the said John Doe duly declared in the said court, in the said action, against Franklin, for that the said R. J. Smith, on the 1st of January, 1844, being a day before any part of the said sum of 52*l.* 10*s.*, parcel, &c., became payable, demised to John Doe, who entered and was ejected by Franklin, &c.: and that such proceedings were thereupon had, &c., that afterwards, *and after the commencement of this suit*, to wit, on the 28th of January, in Hilary term, 8 Vict., it was considered by the said court, that the said John Doe should recover against Franklin his said term, &c.; of all which premises the said R. J. Smith afterwards, to wit, on the day and year last aforesaid, gave notice to the now defendant, and then called upon, and required him to attorn (c) tenant to him the said R. J. Smith of the said messuage, &c., and to pay him for the proceeds, issues, and profits of the said messuage, &c., from the day of the said demise to the said John Doe, and the defendant then attorned (c) tenant to the said R. J. Smith, of the said messuage, &c., and paid him, for the said profits, issues, and proceeds of the same, a large sum of money, to wit, 52*l.* 10*s.*—verification, and prayer of judgment, if the plaintiff ought further to maintain his action.

To this plea the plaintiff demurred specially, assigning for causes—that, although the defendant had therein admitted the making of the indenture of lease, and that he thereupon entered into the demised premises, and became

(a) The proviso in the lease gave an optional power of re-entry, but created no *cesser* of the term *ipso facto*, by the mere force of a breach of covenant.

(b) Franklin, being a stranger to the action against the casual ejector, (the action here referred to,) could not appear to, or plead to, or defend, that action.

(c) No grant having been made of any reversion or remainder expectant upon the defendant's tenancy, there could be no legal attornment. The term is used in the wide and popular sense of—acknowledgment of a tenancy under a new landlord. Vide 6 N. & M. 634, n., 640, n., 4 M. & G. 148.

thereof possessed as tenant to the plaintiff for the said term, yet the defendant had attempted to deny and to put in issue the plaintiff's title as landlord to the said messuage, &c., which the defendant was, by the *755] *said indenture and tenancy, estopped from doing; that the said plea admitted and confessed a breach of the covenant in non-payment of the rent, and a right of action in the plaintiff, without showing how or when the same was satisfied or discharged, or why the defendant was not in law liable to be sued for breaches of covenant in the said lease, or liable for damages in respect of any such breach; that the defendant, in his said second plea, alleged that the title of the plaintiff to the said premises was forfeited before the commencement of the action, for the non-performance of the covenants contained in a certain indenture of demise in the second plea set forth, and that the defendant had pleaded and relied upon such indenture, without making profert of, or offering to produce, the same, or showing any matter in excuse of such profert; that the plea was double and multifarious, in this, that it was therein stated that the said term and interest of the plaintiff had expired and determined before the commencement of the suit, and also that the defendant was evicted by title paramount to that of the plaintiff; and that by the said second plea it was attempted to put in issue matters of law; and that no certain issue could be taken thereon, &c.

Joinder in demurrer.

Channell, Serjt., (with whom was *Petersdorff*), in support of the demurrers. The first plea is bad in substance. It is probably founded upon the 5 & 6 Vict. c. 35, s. 60, No. iv. reg. 9, which provides that "the occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being (all sums allowed by the commissioners being first deducted) as a rate of 7*d.* for every 20*s.* thereof would, by a just proportion, amount unto; which deduction shall *756] be made *out of the first payment thereafter to be made on account of rent; and the tenant paying the said assessment shall be acquitted and discharged of so much money, as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable." That clause gives to the tenant who has paid property-tax that is chargeable on the landlord, the right to deduct the amount on payment of the next rent, but not to set it off in an action. There is nothing in this plea to show by what authority, or when, the alleged assessment was made, or that the residue of the rent was paid. It is true, the payment of property-tax was made the subject of a plea in the case of *Trickler v. Prentice*, 4 Taunt. 549; but that was under the 46 G. 3, c. 65, s. 74.

It is doubtful, on the face of the second plea, whether it seeks to set up an answer to the action by way of eviction, or is intended as a plea of payment of the rent to a third party. It cannot, however, be a plea of eviction; for, there is no allegation that the defendant was tenant in possession at the

time the ejectment was brought, or that there was any eviction until after the commencement of the suit. Neither does it show that the landlord's title expired before the rent became due. [CRESSWELL, J. Does not the second plea sufficiently show that the plaintiff's title ceased and determined, (a) before any of the rent became due, by a forfeiture, of which the landlord afterwards elected to take advantage? MAULE, J. The defence suggested is, that the plaintiff ought not further to enforce his claim to the rent, because, since the commencement of the action, the superior landlord has availed himself of the previous forfeiture, and enforced *his* claim.] That would be giving the tenant a defence by effluxion of time. There is no allegation in the plea that the plaintiff in the ejectment ever enforced that judgment against the present plaintiff.

*Byles, Serjt., *contrà*. The ninth regulation of the 60th section of the recent property and income-tax act, puts the payment of the property-tax on the same footing as a payment to the superior landlord. [MAULE, J. It seems to provide what would have been implied by law without such provision.] The first plea sufficiently shows, on general demurrer, at least, that the money therein mentioned was assessed under that act; for, it could only have been assessed under some act of parliament in force at the time, which authorized a deduction of 7*d.* in the pound. [TINDAL, C. J. When we see the day on which the rate is alleged to have been assessed, and that it is stated to have been *duly* assessed in respect of property for the year next ensuing, we can hardly doubt that the 5 & 6 Vict. c. 35, is the act pointed at, seeing that it is the only statute that will support that statement.] *Tinckler v. Prentice*, 4 Taunt. 549, is a distinct authority to show that a payment of property-tax on account of the landlord, may properly be the subject of a plea. [*757]

The second plea is, in substance, a plea of eviction: it alleges that a forfeiture (b) was incurred, and that, by reason and in consequence of that forfeiture, the superior landlord brought ejectment, and recovered judgment.

The formal objections urged are not sustainable.

Channell, Serjt., was heard in reply.

TINDAL, C. J. A tenant, no doubt, is at liberty to show that his landlord's title has expired by effluxion of time, or has been forfeited by some breach of condition, and that the superior landlord has entered for the forfeiture. That seems to me to be in substance the defence set up in this case, by the second plea. The only objection I can see to it is, that it is an argumentative statement *that the landlord entered for the condition broken; which, however, is not pointed out as a ground of special demurrer. The statement in the plea is, that, "by reason and in consequence of the said forfeiture," an action of ejectment was commenced by Smith, the superior landlord, in which the present plaintiff was made [*758]

(a) *Vide post*, 760, n.

(b) The plea shows a right to re-enter and a judgment in ejectment founded upon a declaration in which an entry by Doe, under Smith, is alleged; but it shows no re-entry in fact, either by Doe or by Smith, under a writ of *habere facias possessionem* or otherwise.

defendant, laying the demise on the 1st of January, 1844, being a day before any part of the rent in question accrued, and that John Doe recovered judgment in that action. It is true, the judgment in the ejectment is not alleged to have been recovered until after the commencement of the present action; and therefore it is that the plea is pleaded to the *further* maintenance of the action. It appears to me that it affords a substantial answer as to the 5*l.* 10*s.*, to which it is pleaded.

COLTMAN, J. There can be no doubt that the second plea discloses a substantially good answer to the action as to the 5*l.* 10*s.*, though I should have had a difficulty in holding it to have been well pleaded, had the real objection been properly pointed out by the demurrer. It appears, that, before the commencement of the present action, the term of the plaintiff was put an end to, that is, that he had committed a forfeiture, and that certain proceedings in ejectment were in consequence had against him. That raises an inference that the superior landlord elected to take advantage of the forfeiture. It is true that it is merely an *argumentative* statement of the fact of the plaintiff's title having been put an end to. But, though many grounds of demurrer are specially assigned, this is not one of them.

MAULE, J. I also am of opinion that both of these pleas must be held to be sufficient. Obscurely as the statute is hinted at, I think the first plea sufficiently shows, upon general demurrer, that the 2*l.* 0*s.* 10*d.* was assessed *759] upon the value of the property under the *5 & 6 Vict. c. 35, s. 60, No. iv., reg. 9. The plea clearly refers to an assessment under some statute; and the plaintiff does not suggest that it was made under any other statute than that of Victoria. It is impossible to entertain any judicial doubt upon the subject. Then comes the question whether money paid by a tenant on account of his landlord under that act, may be set off, or deducted, in an action brought by the landlord for the recovery of rent. The act says, that "the occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof, in respect of the rent payable to the landlord for the time being, (all sums allowed by the commissioners being first deducted,) as a rate of 7*d.* for every 20*s.* thereof would, by a just proportion, amount unto; which deduction shall be made out of the first payment thereafter to be made on account of rent." I think we may hold, without unduly straining the words of the act, that the deduction may be claimed out of the next payment, though made under legal process. It is too much to ask us to go out of our way to put an inconvenient construction upon the words of the act, when they are well susceptible of a meaning that is consistent with reason and justice. For these reasons, I am of opinion that the first plea is a good answer as to the 2*l.* 0*s.* 10*d.*

The second plea, in substance, is this,—that the plaintiff, under whom the defendant held, was entitled to the premises under a lease from one Smith, containing, amongst others, a covenant to insure, and a proviso that Smith should be at liberty to re-enter for breach of that covenant; that there

was a breach of the covenant to insure; that Smith brought an ejectment thereupon and recovered judgment; and that the defendant was called upon to, and did, attorn tenant to Smith, and pay him the 52*l.* 10*s.* for profits, &c. It would be monstrous indeed, if that were to afford no *defence upon the merits. A doubt is raised as to whether the defence is properly pleaded. I think it is. The plea states,—in a manner that seems to me not to be open to objection,—that a breach of covenant had been committed by the plaintiff before any part of the 52*l.* 10*s.* became due for rent, and before the commencement of the action, and that the superior landlord took certain proceedings by reason and in consequence of such forfeiture, and recovered the term (a) from the time of the forfeiture, and that he called upon the defendant, and compelled him to attorn tenant to him, and to pay him a compensation for the use of the land from that time. If that be a sufficient statement of an election on the part of the superior landlord to proceed for the forfeiture, I see no objection to the plea. But, when it is shown that the superior landlord had title by reason of the forfeiture, from a given day, and that he enforced his right from that day, and recovered the term, (a) I think the plea discloses circumstances which made it impossible for the defendant to resist the right of the superior landlord to turn him out. (b) For these reasons, I think the defendant is entitled to judgment on the second plea also.

CRESSWELL, J. I am entirely of the same opinion.

Judgment for the plaintiff. (c)

(a) The term recovered was, not the term held by Franklin, which, consistently with the allegations in the plea, may still subsist, but the term created in favour of Doe,—a term which must here be regarded as having no existence, actual or conventional, Carter not being party or privy to the estoppel arising between Doe and Franklin upon the judgment in ejectment, and being therefore not entitled to set up that estoppel against Franklin.

(b) There was, however, no *actual* turning out.

(c) The lease from Smith containing no clause of forfeiture creating a *cesser* of the term upon a breach of covenant, but merely a power of re-entry, until the exercise of that power, by actual entry, Franklin's term continued. The second plea alleges, not a re-entry, but certain proceedings in ejectment,—proceedings which would be nugatory unless preceded or followed by an entry by or on behalf of Smith, and which, with such entry, would be unnecessary.

*MARRIAGE v. MARRIAGE. May 28. [*761

Debt on a bond in the penal sum of 4000*l.*, the condition of which bond,—after reciting that the obligor was indebted to the obligee in the sum of 2000*l.*, and that the latter had agreed to accept and take from the former, interest for the same at the rate of 5*l.* *per cent. per annum*, payable half-yearly, during the joint lives of the obligee and his wife, in full satisfaction and discharge of the debt, provided the same were regularly paid,—was declared to be, that, if the obligor should pay the interest in the manner stipulated, the obligation should be void; but, in case of failure in payment of all or any part of the interest, for twenty-eight days next after each payment should become due, the same having been demanded, the bond was to remain in full force. The condition further stated that it was agreed, that, in case of failure in making the several payments aforesaid, within the respective times aforesaid, the bond, or any payments made under the same, should not be construed or taken as a discharge of the debt of 2000*l.*, or any part thereof, but the same should forthwith, after such default, become due and payable to the obligee, his executors, &c.

Held—on special demurrer to a plea alleging that the annual sum in the condition mentioned was granted for a pecuniary consideration, and that no memorial was enrolled pursuant to the 52 G. 3, c. 141—that this was not a grant of an annuity within that statute.

Whether the annuity acts apply to annuities granted in consideration of the forbearance of pre-existing debts—*quære*.

The defendant further pleaded, that payment of the second half-yearly payment was not demanded by the plaintiff on the day it became due, or at any time within twenty-eight days after, but that the defendant, after the twenty-eight days, and before the commencement of the action, paid the same to the plaintiff, who accepted it in satisfaction, &c. :—*Held*, on special demurrer, that this was not a good plea of *solvit post diem*, within the 4 Ann. c. 16, s. 12.

DEBT, on a bond in the penal sum of 4000*l*.

The defendant cravedoyer of the bond and condition. The bond was as follows:—"Know all men by these presents, that I, Francis Marriage, of, &c., am held and firmly bound to Joseph Marriage the elder, of, &c., in the penal sum of 4000*l*., of lawful British money, to be paid to the said Joseph Marriage, or his attorney, executors, administrators, or assigns; for which payment to be well and truly made, I bind myself, my heirs, executors, and administrators, firmly, by these presents, sealed with my seal. Dated the 9th of February, 1843." The condition was as follows:—

*762] "Whereas the above-bounden Francis Marriage is indebted to the *above-named Joseph Marriage in the sum of 2000*l*. : and whereas the said Joseph Marriage has, at the request of the said Francis Marriage, agreed to accept and take from the said Francis Marriage interest for the same at the rate of 5*l*. per cent. per annum, payable during the lives of the said Joseph Marriage and Hannah, his wife, at such times and in such manner as hereinafter mentioned, in full satisfaction and discharge of the said debt of 2000*l*., provided the same be regularly paid as hereinafter mentioned: Now, the condition, &c., is such, that, if the above-bounden Francis Marriage, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the said Joseph Marriage, his executors, administrators, or assigns, during the lives of the said Joseph Marriage and Hannah his wife, and the life of the survivor of them, the sum of 100*l*., clear of all deductions, by half-yearly payments, on the 1st of July and the 1st of January in every year, the first payment to be made on the 1st of July next, and also shall well and truly pay unto the executors, administrators, or assigns of the said Joseph Marriage, in case the survivor of them the said Joseph Marriage and Hannah, his wife, should depart this life on any day on which any half-yearly payment of the said interest shall become due, the whole of such half-yearly payment, and if on any day before any half-yearly payment of the said interest shall have become due, then a proportional part of the same, to be computed from the 1st of January or the 1st day of July then last to the day of the death of the survivor of them the said Joseph Marriage and Hannah, his wife, and if on any day between any two half-yearly days of payment, then a proportional part from the last half-yearly day of payment to the day of the survivor's decease, then the above-written bond or obligation shall be null and void; but, in case of failure in

payment of all or any part of the said interest, for the space of [*763
*twenty-eight days next after each or any half-yearly payment of
such interest shall become due, the same having been demanded by note in
writing, or otherwise, the said bond or obligation shall be and remain in
full force and virtue; and the above-bounden Francis Marriage doth hereby
expressly declare and agree, that, in case of failure in making the several
payments aforesaid, or any of them, within the respective times aforesaid,
this bond, or any payment or payments made under the same, shall not be
construed or taken as a discharge of the said debt or sum of 2000*l.*, or any
part thereof, but the same shall, forthwith and immediately after such default
shall happen, become due and payable to the said Joseph Marriage, his
executors, administrators, or assigns, and recoverable under and by virtue
of the said bond or obligation.

The defendant pleaded, first, *non est factum*.

Secondly, that the writing obligatory was made and entered into by the
defendant after the passing of the 53 G. 3, c. 141, and that the annual sum
in the condition mentioned was granted upon and for a pecuniary consider-
ation in that behalf, to wit, for the debt of 2000*l.*, in the recital of the con-
dition mentioned; and that the writing obligatory was made and entered
into by the defendant to the plaintiff for the pecuniary consideration in that
behalf as aforesaid; and that no memorial of the writing obligatory was en-
rolled in the high court of Chancery within thirty days after the execution
thereof, according to the direction of the said act; whereby the writing
obligatory in the declaration mentioned was and is null and void—verifi-
cation.

Thirdly, that, after the making of the writing obligatory, and when the
first half-yearly payment of the annuity or yearly sum of 100*l.*, in the said
condition mentioned, became due and payable, to wit, on the 1st of July
*next after the making of the writing obligatory, the defendant then [*764
paid to the plaintiff, who then accepted from the defendant, the full
amount of the first half-yearly payment, to wit, the sum of 50*l.*, in payment
satisfaction and discharge of the first half-yearly payment of the said annuity
of 100*l.*; and that payment of the second half-yearly payment of the annuity
of 100*l.*, in the condition mentioned, was not demanded by note in writing,
or otherwise, by the plaintiff from the defendant on the 1st of January, 1844,
when the same became due, or at any time within twenty-eight days next
after the same became due, but that the defendant, after the expiration of
the said twenty-eight days, and before the commencement of the suit, to
wit, on the 6th of February in the year last aforesaid, paid to the plaintiff,
who then accepted from him, the full amount of the said second payment
of the said annuity and of all moneys payable in respect of the same, and
that no other instalment of the said annuity of 100*l.* had become due and
payable under or by virtue of the said condition, at any time before the
commencement of the action; and that no sum of money whatever, at the
time of the commencement of the action, was due or owing from the de-

fendant to the plaintiff, for and in respect of any part of the said annuity of 100*l.*, or of any interest in respect thereof—verification.

The plaintiff joined issue on the first plea, and demurred especially to the second and third.

The causes of demurrer assigned, as to the second plea, were as follows: That the same plea does neither by a traverse, nor by a good and sufficient confession and avoidance, contain any answer to the material allegations of the declaration; that the plea, professing to set up and rely upon the alleged non-compliance by the plaintiff with the statutable regulation set forth and referred to in the same plea, does not allege or show to *the
 •765] court any facts or circumstances enabling the court sufficiently, or in any manner, to find, adjudge, or determine that the writing obligatory in the said declaration mentioned did require enrolment: that the defendant, having admitted the fact of the said bond and condition being made upon the consideration and under the circumstances in the recitals to the said condition and in the said condition mentioned, has estopped and precluded himself from successfully contending that any memorial of the same bond and condition was by law required to be enrolled in the high court of Chancery; that the pecuniary consideration mentioned and set forth in the same plea, is not such pecuniary consideration as was contemplated by the statute; that, if the bond declared on was in reality a bond requiring enrolment within the statute, the defendant ought to have shown the fact clearly, which he has wholly failed to do; and, for any thing that appears on the face of the plea, the bond is not within the statute; that the plea seeks to raise a mere question of law for trial by a jury; that no single, certain or material issue can be taken by the plaintiff upon the said plea; and that it is calculated needlessly to perplex, embarrass and prejudice the plaintiff in his replication, and is in other respects too vague, general and insufficient.

The causes of demurrer assigned as to the third plea, were—that the same plea does neither traverse, nor sufficiently confess and avoid, the material allegations of the declaration; that the plea is ambiguous; that it is impossible, as the plea stands, to know or determine whether the defendant thereby admits or denies a breach of the condition of the said writing obligatory; that, if the defendant means to contend that the condition of the said writing obligatory has been duly performed, by reason of the facts and circumstances detailed in such plea, the plea is repugnant and contradictory
 •766] upon the *face of it, by admitting in terms that the payment of the second half-yearly payment of the said annuity or yearly sum of 100*l.*, in the condition mentioned, did not take place until after the same had become due, and the plea indirectly, if not in direct terms, admits that two of the said half-yearly payments had been made before the commencement of the action; that the plea does not sufficiently exclude all possibility of a breach of the condition, but, on the contrary thereof, that it is consistent with every averment in the plea that the said condition has been broken that the defendant has in and by his said plea treated the bond and condi-

tion as if it was necessary that the demand of payment therein mentioned and referred to, should have been made within the twenty-eight days in the condition mentioned, whereas demand of payment made at any time, and whether before or after the expiration of the said twenty-eight days, might work a forfeiture of the said writing obligatory, and it is not denied that a demand of payment was made before the commencement, or after the end, of the said period of twenty-eight days, as it ought to have been; that the plea is not a good and formal plea of *solvit ad diem* or of *solvit post diem*, that it is admitted, by the very language of the plea, that the money was not paid, until after the day appointed for payment thereof had passed, and yet, as a plea of *solvit post diem*, the plea is bad, inasmuch as the writing obligatory declared upon is not a bond within the statute 4 Anne, c. 16, and, at common law, a plea of payment after the day is bad; that, supposing the said writing obligatory to be a bond within the said statute of 4 Anne, c. 16, that statute only enables the defendant to plead a payment not made strictly according to the condition or defeasance, where the obligor shall, before the action brought, have paid the principal and interest due by the condition; that, as a plea of *solvit post diem*, under the authority of the last-mentioned statute, the same is bad, inasmuch as it is pleaded to part only of the cause of action in the declaration mentioned; [*767 that the defendant hath not shown to the court whether or not he was in a position to avail himself of the statute of Anne, or whether he aims at doing so; that, if by the plea the defendant does not mean to confess a breach, or to admit that the time for the said second payment of the said annuity had arrived before the commencement of the action, the plea is bad in substance as well as form, in pleading a payment before the day or time of payment had arrived; that the plea raises a mere question of law for a jury, and offers no single, certain, or material point upon which issue can be taken, and a trial had; that the plea, either as a plea of *solvit ad diem*, is bad and informal, by reason of its not having been in terms pleaded as such, or, as a plea of *solvit post diem*, is defective for the other causes above in that behalf alleged; that the plea offers for the trial of a jury an issue wholly improper to be referred to such a tribunal, and is ensnaring, tricky, complex, and multifarious, and is calculated needlessly to embarrass and prejudice the plaintiff in his replication.

The defendant joined in demurrer. (a)

(a) The points marked for argument on the part of the plaintiff were—“That the second plea neither confesses nor avoids the matter of the declaration; that the plea admits a breach of the condition of the bond, but in no way avoids it; that the bond declared upon is not a bond requiring enrolment within the 53 G. 3, c. 141; that, if it did require enrolment, the defendant should have shown it by his plea; that the plea, as pleaded, shows clearly that no enrolment was necessary; that the plea contains no answer to the action, and is ill pleaded both in form and substance, as shown by the causes of demurrer; that the last plea neither traverses the declaration nor confesses and avoids the matter thereof; that the plea admits breaches of the condition, without in any manner avoiding the same; that the plea does not show upon the face of it whether it is meant to be pleaded as a plea of *solvit ad diem* or as a plea of *solvit post diem*; that, if it be intended as a plea of *solvit ad diem*, it is repugnant and contradictory on the face of it; that, if it be intended as a plea of *solvit post diem*, then the plea is bad, both because the

fendant to the plaintiff, for and in respect of any part of the said annuity of 100*l.*, or of any interest in respect thereof—verification.

The plaintiff joined issue on the first plea, and demurred especially to the second and third.

The causes of demurrer assigned, as to the second plea, were as follows: That the same plea does neither by a traverse, nor by a good and sufficient confession and avoidance, contain any answer to the material allegations of the declaration; that the plea, professing to set up and rely upon the alleged non-compliance by the plaintiff with the statutable regulation set forth and referred to in the same plea, does not allege or show to the court any facts or circumstances enabling the court sufficiently, or in any manner, to find, adjudge, or determine that the writing obligatory in the said declaration mentioned did require enrolment: that the defendant, having admitted the fact of the said bond and condition being made upon the consideration and under the circumstances in the recitals to the said condition and in the said condition mentioned, has estopped and precluded himself from successfully contending that any memorial of the same bond and condition was by law required to be enrolled in the high court of Chancery; that the pecuniary consideration mentioned and set forth in the same plea, is not such pecuniary consideration as was contemplated by the statute; that, if the bond declared on was in reality a bond requiring enrolment within the statute, the defendant ought to have shown the fact clearly, which he has wholly failed to do; and, for any thing that appears on the face of the plea, the bond is not within the statute; that the plea seeks to raise a mere question of law for trial by a jury; that no single, certain or material issue can be taken by the plaintiff upon the said plea; and that it is calculated needlessly to perplex, embarrass and prejudice the plaintiff in his replication, and is in other respects too vague, general and insufficient.

The causes of demurrer assigned as to the third plea, were—that the same plea does neither traverse, nor sufficiently confess and avoid, the material allegations of the declaration; that the plea is ambiguous; that it is impossible, as the plea stands, to know or determine whether the defendant thereby admits or denies a breach of the condition of the said writing obligatory; that, if the defendant means to contend that the condition of the said writing obligatory has been duly performed, by reason of the facts and circumstances detailed in such plea, the plea is repugnant and contradictory upon the face of it, by admitting in terms that the payment of the second half-yearly payment of the said annuity or yearly sum of 100*l.*, in the condition mentioned, did not take place until after the same had become due, and the plea indirectly, if not in direct terms, admits that two of the said half-yearly payments had been made before the commencement of the action; that the plea does not sufficiently exclude all possibility of a breach of the condition, but, on the contrary thereof, that it is consistent with every averment in the plea that the said condition has been broken that the defendant has in and by his said plea treated the bond and condi-

ment, covenanted to settle a sum of 10,000*l.* upon his daughter, in trust to pay the interest to the husband during his life: the father died without having paid the principal money to the trustees: and the husband *having agreed with the executors to accept 5000*l.* and an annuity of 125*l.* for life, in lieu of the 10,000*l.*: it was held that such annuity did not require enrolment. So, in *Keats v. Hick*, 4 B. & C. 69, 6 D. & R. 68, 5 J. B. Moore, 629, it was held that an annuity-bond given in consideration of natural love and affection, by a son to his mother, and or making some provision for her support and maintenance, did not require to be registered under the 17 G. 3, c. 26, although it appeared that the grantee sold her trade, and gave the money arising therefrom, with other money, to her son, for the purpose of establishing him in business. In *Carter v. Smith*, 6 N. & M. 480, a deed of separation, after reciting that differences subsisted between the husband and wife, and that they had agreed to live apart, and that the husband had agreed to give to trustees, for the benefit of the wife, a life-annuity for her separate maintenance, witnessed, that, in consideration of 10*s.* paid by each of the trustees to the husband, and of the covenants thereafter contained, the husband granted to the trustees a life-annuity of 200*l.* for the benefit of the wife: the deed, amongst other covenants, contained one by the trustees to indemnify the husband from the debts of the wife: and it was held that this deed did not require enrolment under the 53 G. 3, c. 141, s. 2. [MAULE, J. It would be extremely difficult to describe the consideration given for this annuity—as it is called—under the column of the memorial headed “Consideration, and how paid.”] It would be absolutely impossible. In *Cumberland v. Kelley*, 3 B. & Ad. 602, in the absence of fraud, it was held that the grant of an annuity, in consideration of a transfer of government stock from the grantee to the grantor, need not be registered under the 17 G. 3, c. 26: and PARKE, J., said: “On these pleadings we must intend that the annuity deed was of a kind not requiring enrolment, for that the granting of the annuity was, on the part of the *grantor, a *bonâ fide* purchase of 333*l.* three *per cent.* consols. If his object had, in fact, been to raise money, the case might have been different; but that does not appear. The term “pecuniary consideration,” in sect. 8 of the statute, is sufficiently explained, by *Crespigny v. Wittenoom*, 4 T. R. 790, to mean money, or such securities for money as bills or notes; and that construction is supported by *Hutton v. Lewis*, 5 T. R. 639, and *Horn v. Horn*, 7 East, 529, 3 J. P. Smith, 522, and the cases, upon the subsequent annuity act, of *James v. James*, 2 Bro. & B. 702, 5 J. B. Moore, 479, and *Tetley v. Tetley*, 4 Bingh. 214, 12 J. B. Moore, 441. Upon these pleadings, the present case is not distinguishable, in principle, from those; and therefore I think the deed is not void for want of a memorial.” If a by-gone debt could be considered as a pecuniary consideration, it is difficult to conceive why a transfer of stock, which is a debt (a) due from the state to the individual holder, should not

(a) The payment of which is deferred so long as the state chooses to pay the interest.

likewise be so. *Frost v. Frost*, 3 B. & Ad. 612, n., however, is expressly in point. There, A. being indebted to B., it was agreed between them, that, in lieu of payment of this amount due, A. should, by bond, secure the payment of an annuity to B.'s widow, after his decease, during the joint lives of A. and the widow: B. died in 1825, and in 1828 A. executed an annuity deed pursuant to the agreement: and it was held that the deed did not require enrolment under the 53 G. 3, c. 141.

The 12th section of the statute 4 Ann. c. 16, enacts, that "where any action of debt shall be brought upon any single bill, or where action of debt, or *scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment
*772] shall and may be pleaded in bar of such *action or suit; and, where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeazance or condition of such bond, though such payment was not made strictly according to the condition or defeazance, yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeazance, and had been so pleaded." The object of the legislature evidently was, to meet the case of an ordinary money bond, with a penalty, conditioned for the payment of a lesser sum on a day certain: it contemplates the case of a payment that shall be a complete answer to the demand—a complete satisfaction and discharge of the security sued upon. Now, here, it is not pretended that the principal has been paid, or that all the interest has been paid according to the condition. The bond is conditioned for the payment of interest upon the 2000*l.*, at 5*l.* per cent., half-yearly during the lives of the obligee and his wife; and is to be in full force, and the debt is to revive, in case of failure in payment of any part of the interest for twenty-eight days next after each half-yearly payment shall have become due, and shall have been demanded. In order to render the obligor liable to pay the principal sum, on default in payment of interest, it was not necessary that it should have been demanded within the twenty-eight days; and the plea does not negative a demand after the expiration of the twenty-eight days. All conditions are to be construed strictly, as against the obligor: it is for him to make out a good defence in point of law, and a good compliance
*773] in point of fact with the terms of the *defeazance. The plea is clearly bad, in substance and in form.

Byles, Serjt., contra. This case is within the very mischief the annuity acts were framed to prevent. This is, in effect, if not in terms, a grant of an annuity: and it is no objection that the consideration is a by-gone debt: *Shove v. Webb*, 1 T. R. 732; *Ex parte Fallon*, 5 T. R. 283; *Kelf v. Ambrosse*, 7 T. R. 551. In *Ex parte Fallon*, Lord KENYON said: "The great

mischief intended to be provided against by the legislature in this act, 17 G. 3, c. 26, s. 3, was, the fraud and circumvention of those who took advantage of the necessities of distressed persons desirous of taking up money upon annuities, by putting of goods upon the latter at their own price, instead of money; which goods they were afterwards to dispose of at considerable loss. For this reason, the legislature required that the consideration should be in money, and not in goods. But it is not necessary, nor was it ever intended, that the money should be actually told down at the time of the grant." And in *Kelfe v. Ambrosse*, it was held that money lent and paid at different times, for the education and advancement of the defendant, is a good consideration for the grant of an annuity within the 17 G. 3, c. 26, s. 3. And the same learned judge said: "The legislature did not intend to prohibit a debtor granting an annuity for a debt fairly and honestly contracted, which the debtor, perhaps, may have no means of paying but by granting an annuity." And ASHHURST, J., said: "This act of parliament was made for the protection of necessitous persons; but it was never meant to extend to an annuity granted for a fair and honest consideration. The legislature only intended to prohibit the granting of annuities in consideration of goods, sold at an advanced price, *instead of money: but, where an annuity is granted for a money consideration, it is not necessary that the money should be paid down at the instant." [*774 CRESSWELL, J. What is the purchase-money the grantor gets as the consideration for this annuity?] 2000*l*. [CRESSWELL, J. No. All he gets is the forbearance of a debt of 2000*l*.] That clearly is a pecuniary consideration within the mischief which the annuity acts were intended to meet. [MAULE, J. You seem to assume that a sum payable annually is an annuity. Where do you find such a definition of an annuity?] "An annuity is a yearly payment of a certain sum of money granted to another in fee, for life or years, charging the person of the grantor only:" Co. Litt. 144 b. So, in *Fitzherbert's Natura Brevium*, 151, A., it is said: "A writ of annuity lieth where a man granteth unto another a yearly rent for life, or for years, or in fee, out of his lands, or out of his coffers, or to receive from his person, yearly at a certain day." Covenant would lie upon this bond: *Comyns's Digest*, title *Covenant*, (A. 2,) citing Ca. Ch. 294.

As to the third plea—the statute 4 Ann. c. 16, is clearly applicable to annuity-bonds. In *Bridges v. Williamson*, 2 Stra. 814, and *Bonafous v. Rybot*, 3 Burr. 1370, bonds for payment of money by instalments were held to be within sect. 13.(a) In the latter case Lord MANSFIELD says: "This act of parliament reforms in some instances an erroneous course of proceeding in the courts of law and equity, which ought never to have prevailed, and

(a) Which enacts, s. 13, "that, if at any time pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity, upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant, of and from the same, accordingly."

*775] which the *courts themselves might, and ought to, have remedied, but did not. Therefore, it should not only have the most *liberal* construction, but the courts ought to exercise their own authority to extend the spirit and reason of this parliamentary interposition ‘for the easier, speedier, and better advancement of justice,’ to cases not mentioned in the act.” The same learned judge, in *Wyllie v. Wilkes*, 2 Dougl. 519, says: “This is a remedial law; and, if a case is within the mischief, the remedy ought to extend to it. I should have thought, therefore, that payment *after* the day might be pleaded to an action on an annuity-bond. In the case of *Webster v. Bannister*, 2 Dougl. 393,—as far as it was necessary to consider the point,—we were all inclined to think, that, even without an express agreement to give further time, the receipt of the money after the day would have been sufficient.” [TINDAL, C. J. Is this a bond for payment of money by instalments? And, if it is, does the case necessarily fall within the twelfth section of the statute, because it may be within the thirteenth?] The bond is for payment of certain sums of money periodically: it makes no difference that those sums are called interest. The thirteenth section may well be used for the purpose of explaining the meaning of the twelfth. [TINDAL, C. J. The twelfth section says that a payment after the day must be a payment of principal and interest. Is this a plea of payment of principal and interest?] The words of the act are, “principal and interest *due*.” Here, the plea alleges that all that was due for interest has been paid. [CRESSWELL, J. The lesser sum, contemplated by the act, is principal, not interest. MAULE, J. I do not see how the defendant can bring himself within the statute of Anne, without showing payment of the 2000*l*.] The *776] 2000*l*. were not due until default in payment of the *interest for twenty-eight days, and *demand made*. [MAULE, J. The payment is to be made within twenty-eight days, whether demanded or not. It is essential to the construction you are seeking to put upon the condition, that the 2000*l*. is a *penalty*.] It is in the nature of a penalty. In *Hodgkinson v. Wyatt*, 1 D. & L. 668, it was held that the 4 Ann. c. 16, s. 12, applies to cases where payments of interest are made after the days appointed, as well as to payments of principal.

Manning, Serjt., was heard in reply.

Cur. ado. vult.

TINDAL, C. J. I am of opinion that the contract stated in the condition of the bond declared on in this case, is not a grant of an annuity within the statutes, and, therefore, that no memorial was required to be enrolled: the plaintiff, consequently, is entitled to judgment on the second plea. We have no right to take into our consideration any extrinsic circumstances, for the purpose of putting a different construction upon the contract of the parties from that which upon the face of it belongs to it. It is sufficient to advert to the recital of the agreement in the condition, which is, that the defendant was indebted to the plaintiff in 2000*l*., and that the plaintiff had, at the request of the defendant, agreed to accept and take from the defendant, interest for the same at the rate of 5*l*. *per cent. per annum*, payable

during the lives of the plaintiff and his wife, at such times and in such manner as thereafter mentioned, in full satisfaction and discharge of the said debt of 2000*l.*, provided the same were regularly paid. There was probably some relationship between the parties; and the obligee was content, provided he received the interest *regularly, to forego the principal. By the contract, the obligor, who before was liable for 2000*l.* and interest, gets a condonation of the principal upon condition that he regularly pays the interest. How can that be called a grant of an annuity? It certainly is a contract that is immeasurably distant from those which it was the object of the annuity acts to provide for. In the case of an annuity, the money advanced is irrecoverably gone; nothing is forthcoming to the grantee but the stipulated annual payments. That is not the case here; for, the agreement is, that, if the interest, or any part thereof, shall remain unpaid for the space of twenty-eight days, demand thereof having been made, the bond shall remain in force. *Winter v. Mouseley*, 2 B. & Ald. 802, seems to be an authority to show that this is not an annuity within the meaning of the statutes. If it were necessary to go further, there is the difficulty—that has been adverted to by my brother MAULE—of filling up the column in the memorial that is headed “consideration, and how paid.” Admitting, for the sake of argument, that an annuity granted for a bygone consideration may require enrolment, at least it must be such a debt as may be accurately described. For these reasons I am of opinion that this is not an annuity within the statutes 17 G. 3, c. 26, and 53 G. 3, c. 141. As to the third plea,—which is, in substance, *solvit ad diem* as to one payment, and *solvit post diem* as to the other,—it appears to me that the defendant has not inserted therein sufficient to bring it within the statute 4 Ann. c. 16. It is quite consistent with the plea that the money was demanded before the payment was made; and therefore the plea does not negative that the defendant had become liable for the 2000*l.*; and the statute does not authorize a payment *post diem*, unless all is paid that has become *due. Upon this plea, also, I think the plaintiff is entitled to judgment. [*777]

COLTMAN, J. I am far from saying that there might not be a bond in the present form, within the annuity acts. But this is a transaction of a nature totally different from those contemplated by those acts. Here there was no advance of money at all. I have great doubts as to whether an annuity granted for a bygone consideration is, in any case, within the statutes. *Kelfe v. Ambrose*, 7 T. R. 551, where the point arose, cannot be considered to have decided it. ASHHURST, J., seems to have been of the opinion to which I incline: for, he says: “This act of parliament (a) was made for the protection of necessitous persons; but it was never meant to extend to an annuity granted for a fair and honest consideration. The legislature only intended to prohibit the granting of annuities in consideration of goods sold at an advanced price instead of money; but, where an

(a) 17 Geo. 3, c. 26.

annuity is granted for a money consideration, it is not necessary that the money should be paid down at the instant." Independently, however, of that, looking at the condition of this bond, it amounts to nothing more than this, that, in consideration of the due payment of the interest, the obligee consents to forego the principal debt. It appears to me that this is not such a grant of an annuity as requires enrolment. As to the question upon the statute of Anne, it will be proper to advert to the observation reported to have been made by PATTESON, J., in *Hodgkinson v. Wyatt*, 1 D. & L. 668; for, if the defendant in this case meant to avail himself of that statute, he should have pleaded payment of the 2000*l.* The proviso for payment of that sum, is not in the nature of a penalty, but is a clause introduced merely

*779] for the purpose of preventing the obligor from praying in aid the payments, made on account of interest, in reduction of the principal.

MAULE, J. I also am of opinion that the plaintiff is entitled to judgment upon both pleas. This is an action of debt on a bond, the condition of which is set out on oyer. It appears that the transaction was of this description:—The defendant being indebted to the plaintiff in the sum of 2000*l.*, the latter agreed to forbear to demand payment so long as the former should punctually make the half-yearly payments of interest thereby reserved; and, further, that, if the obligor continued duly to pay such interest during the respective lives of the plaintiff and his wife, the principal debt should be altogether remitted. Such being the nature of the transaction, the first question is, whether it amounts to a grant of an annuity of 100*l.* a year within the statutes. That it is not, in terms, a grant of an annuity, is clear; though I agree, that, if it were so in substance, it would, notwithstanding, be within the provisions regulating dealings of that description. The circumstance, however, of the transaction not being precisely within the terms of the annuity acts, renders it necessary for the defendant to show that it is clearly within the mischief which those acts were designed to remedy. The mischief contemplated was, the making of improvident bargains by needy persons, in order to raise money to meet present necessities. This transaction is as far removed from that as can well be conceived. There was a previously existing debt of 2000*l.* due from the obligor. He contracts to do nothing that amounts to an excessive consideration for the advantage he is to obtain. He was clearly liable for the 2000*l.*, and, if there had been a demand of the debt, he was also liable for interest. The creditor agrees

*780] not to call for the principal at all, provided *the interest is punctually paid during his own and his wife's lives. In substance and effect, therefore, it is a gift to the defendant. The transaction is neither within the spirit nor the words of the annuity acts; and consequently the objection to the first plea fails.

As to the second plea—the condition of the bond is, that, if the defendant shall pay 50*l.* each half year, and within twenty-eight days next after the same shall become payable, the bond shall not be put in force at all; but

that, in case of failure in payment of all or any part of the said interest, for the space of twenty-eight days next after each or any half-yearly payment of such interest shall become due, the same having been demanded by note in writing or otherwise, the bond is to remain in full force. The consideration then goes on to state, that, "in case of failure in making the several payments aforesaid, or any of them, within the respective times aforesaid, this bond, or any payment or payments made under the same, shall not be construed or taken as a discharge of the said debt or sum of 2000*l.*, or any part thereof, but the same shall forthwith, and immediately after such default shall happen, become due and payable." If there is a demand and non-payment for twenty-eight days, the bond is to remain in force as an absolute bond for 2000*l.* In order to make a good defence, it was for the defendant to show that such a state of things had not arisen. This he has not done. On the contrary, the plea shows that the alternative provided for by the condition has arisen; and, in order to make it a good plea of *solvit post diem*, (supposing the statute of Anne to apply at all,) the defendant should have alleged that he paid the 2000*l.* Not having done so, this plea likewise is bad.

CRESSWELL, J. I am entirely of the same opinion. The transaction in question is clearly not within the *annuity acts. Taking the bond [781 as it is set out, it is an ordinary money bond, the condition of which, reciting that the obligor is indebted to the obligee in 2000*l.*, stipulates for the payment half-yearly of interest thereon: there is nothing to show that any other than lawful interest is stipulated for. It is further agreed, that, if the obligor shall duly pay the interest half-yearly during the lives of the obligee and his wife and the life of the survivor of them, the bond shall be void. What is it, then, that is parted with as the consideration for the annuity? There was a pre-existing debt. Is that parted with? Certainly not. The creditor agrees to forbear to demand the debt, provided 5 *per cent.* interest is regularly paid each half-year. The debt is not cancelled; it is to revive in case of failure on the part of the debtor in payment of the interest in the manner stipulated for; and the condition expressly provides, that, "in case of failure in making the several payments aforesaid, or any of them, within the respective times aforesaid, the bond, or any payment or payments made under the same, shall not be construed or taken as a discharge of the said debt or sum of 2000*l.*, or any part thereof, but the same shall forthwith and immediately after such default shall happen, become due and payable to the obligee, his executors," &c. It was perhaps necessary to introduce that clause, to make it more clear that the half-yearly payments were payments of interest only. This shows that the original debt remains. The transaction, therefore, is neither within the terms nor the spirit of the annuity acts. In *Cumberland v. Kelley*, 3 B. & Ad. 602, there are strong observations by LITTLEDALE, J., and PARKE, J., to show the inclination of their opinions to be, that a by-gone debt cannot properly be the consideration for the grant of an annuity requiring enrolment. Independently,

*782] "however, of that question, there is nothing to show that this transaction was in fact any other than upon the face of the condition it purported to be.

As to the other point—the defendant seeks to avail himself of the statute 4 Ann. c. 16, by showing payment of the second half-year's interest after the expiration of the twenty-eight days. He does not, however, allege payment of the 2000*l.*; and therefore that plea affords no answer to the action.

Judgment for the plaintiff.

STEAD v. POYER and Another. *May 30.*

To a count by A. against B. for goods sold and delivered, B. pleaded, as to 4*l.*, parcel, &c. that on a certain day, at the request of A., he delivered to C., for A., certain goods; that it was "then," to wit, on the day and year aforesaid, in consideration thereof, agreed between A. and B. that A. should accept such delivery to C. in full satisfaction and discharge of the premises as to the 4*l.*, &c., and that A. did "then" accept such delivery in full satisfaction and discharge:—*Held*, on special demurrer for ambiguity, that the plea was bad, inasmuch as it might mean either that the agreement to accept the delivery of the goods to C. in satisfaction took place at the same time as the delivery, or at a subsequent period.

ASSUMPSIT. The first count charged the defendants with refusing to accept a quantity of wooden blocks for paving, pursuant to an agreement. The second count stated that the defendants were indebted to the plaintiff in 2000*l.* for the price and value of goods sold and delivered by the plaintiff to the defendants at their request. (a)

Plea—as to 4*l.*, parcel of the moneys in the second count mentioned, &c.—that, after the making of the promises in that count mentioned, and before the commencement of the suit, to wit, on the 4th of January, 1844, *783] the defendants, at the request and by the *direction of the plaintiff, delivered to one W. Kerr, for the plaintiff, a large quantity of paving blocks, to wit, 10,000 paving blocks, being parcel of the said goods and chattels in the second count mentioned to have been sold and delivered by the plaintiff to the defendants, and it was *then*, to wit, on the day and year aforesaid, and before the commencement of the suit, in consideration thereof, agreed by and between the plaintiff and the defendants, that the plaintiff should accept such delivery to the said W. Kerr in full satisfaction and discharge of the promises in the second count mentioned as to the said sum of 4*l.*, parcel, &c., and of all damages by him sustained by reason of the non-performance thereof; and that the plaintiff did then accept such delivery, in full satisfaction and discharge of the promises and damages aforesaid—*verification*.

Special demurrer, assigning for causes, "that the plea neither traverses, nor sufficiently avoids, the causes of action to which it is pleaded; that it is not averred, nor doth it sufficiently appear, in or by the said plea, how, in what manner, or under what circumstances, the defendant, by the de-

(a) As to the request, see 1 Mann. & Gr. 265, (b), 12 M. & W. 759.

livery to the said W. Kerr of the paving-blocks therein mentioned, became or was discharged from his promises, or the causes of action, therein pleaded to; that the plea doth not sufficiently aver or show, or, if it does aver or show, shows only by argument and inference, that the said blocks were delivered by the defendants to the said W. Kerr, or the plaintiff, in accord and satisfaction of the promises or causes of action, or after or in pursuance of the alleged agreement, or *what connection, if any, there was between the said delivery and agreement*; that the plea does not aver, or state, with sufficient certainty any consideration or value for the plaintiff's entering into the said agreement, or that the said blocks were of any value; that the said plea, if good at all, is only good as a roundabout *plea of [784 accord and satisfaction, and ought to have followed the usual and approved form of such a plea, by stating a delivery and acceptance in satisfaction, and it savours of novel and strange device, and is calculated to perplex the plaintiff in replying thereto."

Joinder in demurrer.

Channell, Serjt., in support of the demurrer. The plea in question is not a plea of accord and satisfaction in the ordinary form; it states that the defendant delivered the goods in satisfaction, but it does not go on to allege that the plaintiff accepted them in satisfaction. And, the plea being in discharge, the plaintiff could not reply *de injuriâ*; he is consequently exposed to a difficulty to which he ought not to be subjected. [TINDAL, C. J. The plea states that the goods were delivered to Kerr for the plaintiff and at his request, and that it was *then*, that is, at the same time, agreed between the plaintiff and defendant that the plaintiff should accept such delivery in satisfaction. The plaintiff might have replied that he did not accept the delivery to Kerr in satisfaction.] If the plea had pursued the ordinary form, the whole might have been put in issue. [TINDAL, C. J., referred to *Peytoe's* case, 9 Co. Rep. 80 b, where the rule is thus laid down:—"The best and most secure form of pleading of an accord, is, to plead it by way of satisfaction, and not by way of accord; for, if he pleads it by way of accord, he ought to plead the precise execution thereof in the whole, and if he fails in any part thereof, his plea is insufficient; but by way of satisfaction he shall plead no more than that the defendant paid the plaintiff 6l. 10s. in full satisfaction of the same action, which the plaintiff received, &c.; judgment, if action. And this is well approved by the book in 19 H. 6, *29 b,(a) in a writ of forger of false deeds. *Markham*, [785 Serjt., for the defendant, (taking) by protestation that he did not forge, for plea said that the defendant gave the plaintiff a gallon of wine in satisfaction of the action, which gallon of wine the plaintiff accepted, &c.; judgment, if action. And then *Fortescue*, Serjt., of counsel with the plaintiff: It is no plea, unless you say that there was an accord betwixt the plaintiff and defendant, &c.(b) NEWTON, the Chief Justice, who gave the

(a) M. 19 H. 6, fo. 29, pl. 52.

(b) *Markham* answered, "I shall say no more."

rule in the case: It is the best pleading as *Markham* has pleaded, in my opinion, and substantial enough; for, if he has given the plaintiff a gallon of wine for the same trespass, which the plaintiff has received, what would you then? &c. And afterwards *Fortescue* denied the receipt of the gallon of wine in satisfaction of that trespass." The plea should have stated expressly, or by necessary implication, that the goods were delivered and accepted in satisfaction. It is, at all events, ambiguous in the point assigned as a ground of demurrer; for, the word "then" may refer to a period subsequent to the delivery. (a)

Byles, Serjt., contra. The plea in question is a good plea in satisfaction. It alleges that the goods were delivered at the request of the plaintiff, that it was agreed between the plaintiff and the defendants that the plaintiff should accept such delivery in satisfaction, and that the plaintiff did then accept such delivery in full satisfaction and discharge. The plea, therefore, has all the elements of a good plea of accord, in the form approved by Lord Coke, in *Peytoe's* case. [CRESSWELL, J. Consistently with this plea, there may have been no agreement at the time of the delivery of the goods.] Nor is it *necessary that there should be. The plaintiff *786] is under no such difficulty as to his replication as is suggested: he might have replied that there was no delivery and no acceptance in satisfaction. The word "then" means contemporaneously, which, in *Thornton v. Jenyns*, 1 Mann. & Gr. 166, 1 Scott, N. R. 52, was held to be the fair and reasonable construction of the word. [MAULE, J. That was on general demurrer: here, however, the ambiguity is stated as a cause of special demurrer.] It is usual in pleading, where reference is intended to be made to something subsequent, to allege it to have occurred "afterwards." The word "then" is insensible unless it points to something contemporaneous.

TINDAL, C. J. I certainly thought; and do still think, that the word "then" is capable of being construed as meaning "at the same time;" and I was rather inclined to hold that to be the proper construction to be put upon this plea. The word, however, is certainly also susceptible of another meaning, namely, that the alleged agreement took place subsequently to the delivery of the goods. And, as the plea is in this respect ambiguous, and such ambiguity is pointed out as a cause of special demurrer, I think we are bound to yield to the objection. Where a party in pleading leaves the beaten track, his plea is to be looked at strictly.

COLTMAN, J. I also think the word "then" is capable of a meaning other than that suggested by my brother *Byles*. It may mean that the delivery of the goods and the agreement stated in a plea were simultaneous; but it would be satisfied by proof of a subsequent agreement. I cannot *787] but think that the defendant had a motive for stating it so ambiguously: *and, the ambiguity being pointed out as a ground of

(a) In which case the allegation—that the delivery took place at the defendant's request—would appear to be material and traversable.

special demurrer, it seems to me that the plaintiff is entitled to judgment. In *Thornton v. Jenyns*, the point arose on a special demurrer to the replication.

MAULE, J. I am of the same opinion. The defendants have had recourse to a studied and elaborate ambiguity, with a view to defeat the plaintiff as to the 4^l. The meaning of the plea, according to the ordinary rules of construction, is, that the defendants, at the request of the plaintiff, delivered certain goods to a third person, and that, at some time or other on the same day, but whether before or after the delivery, does not appear, it was agreed between the plaintiff and the defendants that the plaintiff should accept, and that he did then accept, such delivery in full satisfaction and discharge. It is agreed that this would not amount to a defence unless the agreement took place antecedently to, or at the same time with, the delivery. (a) The allegation, however, would be satisfied by proof of an agreement at any time on the same day, or, perhaps, at any time before the commencement of the suit. I therefore think the plea is bad on special demurrer. If pleaded over to, perhaps the plea might have been good; but that would be on this ground—that, when the plaintiff does not choose to demur on the ground of ambiguity, but replies, he, by adopting that course, admits the plea to be an answer to the action, if capable of being construed in such a sense as to make it a good answer; and though such a construction may be a somewhat forced one, still the plea must receive it. (b) It would be only by virtue of that rule of pleading, and not by reason of its common sense construction, that this plea, *if replied to, would have been held good. Reading it according to the constrained [*788 construction suggested by my brother *Byles*, this plea might be taken to allege a contemporaneous agreement. But it is clearly also susceptible of another and a more natural construction, namely, that the agreement was subsequent; (c) and, as the ambiguity is pointed out as a ground of special demurrer, we are bound to hold the plea bad.

CRESSWELL, J. I agree with the rest of the court in thinking this plea ambiguous; and, the ambiguity being properly pointed out as a ground of special demurrer, the demurrer must prevail. The word “then” in the plea undoubtedly may be construed to import that the whole was one continuous transaction; but it may also mean that the delivery of the goods, and the agreement to accept such delivery in satisfaction, were entirely separate and independent transactions.

Judgment for the plaintiffs.

(a) *Quare*, as to the effect of a subsequent agreement founded upon the delivery at the plaintiff's request.

(b) *Vile Hobson v. Middleton*, 6 B. & C. 295, 9 Dowl. & R. 249; *Brandas v. Barnett*, 1 Mann. & Gr. 928.

(c) The consideration of the agreement would appear to be not goods to be delivered, but goods delivered.

GULLIVER v. COSENS. May 31.

Where cattle are distrained as damage feasant, the owner cannot, without tendering amends, pay, under protest, an excessive sum demanded for damage, and recover the amount as money had and received to his use.

If a sufficient tender is made before the distress, the remedy is replevin or trespass; if after the distress, (and before the impounding,) detinue.

DEBT, for money had and received to the plaintiff's use. Plea, *nunquam indebitatus*.

At the trial before ALDERSON, B., at the last assizes for Sussex, it appeared that a flock of sheep, belonging to the plaintiff, having strayed upon the defendant's land, they *were distrained, as damage feasant, by *789] the defendant, who refused to restore them except upon payment of 2l. 15s. 9d., at which amount he estimated the damage they had done. The plaintiff paid the 2l. 15s. 9d., under protest, and, to recover it, brought this action.

For the defendant, it was insisted, upon the authority of *Lindon v. Hooper*, Cowp. 414, (a) that the action was not maintainable, and that, where an exorbitant demand was made for compensation, the only remedy was replevin.

The learned judge directed a nonsuit, reserving to the plaintiff leave to move to enter a verdict for the sum claimed, if the court should be of opinion that the action was well brought. The actual damage done by the sheep was estimated by the jury at 5s.

Sir T. Wilde, Serjeant, in Easter term last, accordingly obtained a rule nisi. He referred to *Hills v. Street*, 5 Bingh. 37, 2 Moore & P. 96; *Knibbs v. Hall*, 1 Esp. N. P. C. 84; *Shaw v. Woodcock*, 7 B. & C. 73; *Barrett v. The Stockton and Darlington Railway Company*, 3 Mann. & Gr. 956, 3 Scott, N. R. 803; (b) *Ashmole v. Wainwright*, 2 Q. B. 837, 2 Gale & D. 217; and *Parker v. The Great Western Railway Company*, 7 Mann. & Gr. 253, 7 Scott, N. R. 835; and he distinguished the present case from that of *Lindon v. Hooper*, on the ground that there the party was asserting a right of common, a right which the court considered an action of assumpsit for money had and received, not properly adapted to try. [CRESSWELL, J., referred to *Anscomb v. Shore*, 1 Taunt. 161, and *Browne v. Powell*, 4 Bingh. 230, 12 J. B. Moore, 454.]

*790] *Channell, Serjt., (with whom was Johnson,) now showed cause. It is not denied that, generally speaking, money extorted by any kind of duress, may be recovered back in an action for money had and received. The case of a distress, however, stands upon peculiar grounds. *Lindon v. Hooper* is an express authority to show that money paid to procure the release of cattle taken damage feasant cannot be recovered back in that form of action,

(a) And see *Shipwick v. Blanchard*, 6 T. R. 298; *Thurston v. Mills*, 16 East, 254, 273; *Nesome v. Graham*, 10 B. & C. 234, 5 Mann. & Ryl. 64; *Thomas v. Harries*, 1 Mann. & Gr. 684, 709, 2 Mann. & Gr. 140, 141, 709; *Close v. Phipps*, 7 Mann. & Gr. 586, 8 Scott, N. R. 381.

(b) Affirmed in Dom. Proc. 7 Mann. & Gr. 870, 8 Scott, N. R. 641.

although the taking be wrongful; and the reason assigned by Lord MANSFIELD for so deciding, is, the hardship and injustice that would be imposed upon the defendant, by allowing an action to be maintained in that form. "The present case," says his lordship, "is singular, and depends upon a peculiar system of strict positive law. Distraining cattle doing damage is a *summary execution* in the first instance. The distrainer must take care to be *formally* right: he must seize them in the act, upon the spot; for, if they escape, or are driven, out of the land, though after view, he cannot distrain them. He must observe a number of rules in relation to the impounding, and manner of treating, the distress. The law has provided two precise remedies for the proprietor of cattle which happen to be impounded. First, he may replevy; and, if he does, upon the avowry he (the distrainer) must specially set out a right of common, or some other title, as a justification of the cattle being where they were taken; or, secondly, if he (the distrainee) does not choose to replevy, but is desirous to have his cattle immediately re-delivered, he may make amends, and then bring an action of trespass for taking his cattle, and particularly charge the money so paid by way of amends, as an aggravation of the damage occasioned by the trespass. If, to such an action, the distrainer pleads that he took them doing damage, the plaintiff must specially reply the right or title which he alleges (means to contend) the cattle had *to be there. If, instead of an action of trespass, an action to recover back the money so paid by way of amends, might be brought, at the election of the plaintiff, the defendant would be laid under a great difficulty. He might be surprised at the trial: he could not be prepared to make his defence: he could not tell what sort of right of common, or other justification, the plaintiff might set up. The plaintiff might shift his prescription as often as he pleased; or he might rest upon objections to the regularity of the distress. The plaintiff can never be suffered to elect to throw such a difficulty upon his adverse party. Besides, as applied to the subject-matter of this question, the action for money had and received could never answer the equitable end for which it was invented, and deserves to be encouraged; for, the point to be tried and determined in this action, is, whether the plaintiff's cattle trespassed upon the defendant's land. That may depend upon the plaintiff's right, or the defendant's right, or the fact of trespassing; or it may depend upon mere *form*. If the distress was irregular, the amends must be recovered back again; so that, allowing the owner of the cattle to substitute this remedy in lieu of an action of trespass, would, as between the parties, be unequal and unjust; and, upon principles of policy, would produce inconvenience. It would break in upon that branch of the common and statute law which relates to distresses. It would create inconvenience, by leaving rights of common open to repeated litigation, and by depriving posterity of the benefits of precise judgments upon record. There is a material distinction between this and the instances alluded to at the bar, where the plaintiff is allowed to wave the trespass, and bring an action for money had and re-

ceived. In *those* instances, the relief is more favourable to the defendant: *792] he is liable only to refund what he has actually received *contrary to conscience and equity. In *this*, informalities in taking or treating the distress would avoid the amends, though the defendant had a right to distrain. But—which is more material—in *those* instances, the plaintiff, by electing this mode of action, eases *the defendant* of special pleading, and takes the risk of being surprised upon himself. In *this*, he eases *himself* of the difficulty and precision of special pleading, and the burden of proof consequent thereupon, and exposes the defendant to uncertainty and surprise." Case will not lie for the detention of cattle taken damage feasant, where no tender of amends is made until after the impounding; *Sheriff v. James*, 1 Bingh. 341, *Broune v. Powell*, 4 Bingh. 230, 12 J. B. Moore, 454. If the present action be maintainable, the plaintiff will be placed in a better position than that in which he would have stood had he brought replevin, or brought detinue or case after a tender; for, if he had made a tender, it would have rested upon him to show its sufficiency. Until a tender of sufficient amends, the distrainer was no wrong-doer: in the absence, therefore, of a tender, the receipt of the money was not unlawful. *Knibbs v. Hall* decided that, where a party pays money under a threat of a distress, he cannot recover it back, but should have adopted the remedy the law has provided, by suing out a replevin. *Hills v. Street* does not apply. That was an action against a broker, who had extorted, as the price of giving time, money which he was not in law entitled to receive: he was therefore guilty of a wrongful act. (a) In *Skeate v. Beale*, 11 Ad. & E. 983, 3 Perr. & Dav. 597, the plaintiff having distrained for rent, the defendant, in consideration of his withdrawing the distress, undertook to pay a certain sum for the arrears: to a declaration upon this agreement, the defendant pleaded that the plaintiff, *793] having distrained for *more rent than was due, threatened to sell the goods distrained: that thereupon the defendant was forced and obliged to make the agreement; that no part of the sum specified was due beyond what he paid; and that, in respect of the residue, the agreement was without consideration: and the court held the pleas bad, on motion for judgment *non obstante veredicto*. *Barrett v. The Stockton and Darlington Railway Company*, *Ashmole v. Wainwright*, and *Parker v. The Great Western Railway Company*, were cases in which public carriers refused to perform a duty cast upon them by the law, unless they were paid an exorbitant demand for carriage. The defendants there were clearly wrong-doers. [MAULE, J. It was the carriers' duty to ascertain the charge: there is no analogy between those cases and the present.]

Dowling, Serjt., (with whom was *Bovill*), in support of the rule. *Lindon v. Hooper*, upon the authority of which the defendant mainly relies, is considerably shaken by subsequent decisions; and, at all events, it is distinguishable from the present case, inasmuch as there, the owner of the cattle might have brought replevin; which the plaintiff here could not, the distress

(a) Vide *anté*, 589 (a).

being lawful; and consequently, unless this action be maintainable, the plaintiff is without remedy. [MAULE, J. In *Anscomb v. Shore*, 1 Taunt. 261, there having been no tender of amends made until after the distress, the owner of the cattle could not maintain replevin; he therefore brought case for the subsequent detention; and the court held that case would not lie, the defendant not being a wrong-doer. That is, in effect, this case; the plaintiff cannot recover back the money, unless its receipt by the defendant was wrongful.] The detention of the plaintiff's sheep, until he complied with the defendant's excessive demand, was a wrongful act. In *Ashmole v. *Wainwright*, PATTERSON, J., says: "I should be sorry to throw [794 any doubt upon the point, that an action for money had and received will lie to recover money paid on the wrongful detainer of goods: it would be very dangerous to do so; the doctrine being, in itself, so reasonable, and supported by so many authorities." [MAULE, J. The owner of the land is no wrong-doer if he distrains before tender made; nor is he a wrong-doer if he impounds before tender, or after an insufficient tender. Here, the real question is, whose duty it was to estimate the damage: if the owner of the cattle was bound to make a tender, he was to ascertain the amount at his peril.] In all such cases, it is competent to a party to waive the tort, and rely upon the implied contract arising out of the receipt of the money. [TINDAL, C. J. But he must not place his opponent in a worse position than that in which he would otherwise have stood.] The party who, by seizing, takes upon himself to assert that he is damaged, is surely the proper person to estimate the damage: he has the best, and perhaps the only means of information. At all events, if he chooses to make an excessive demand of compensation, he thereby relieves the owner of the cattle from the necessity of entering into any consideration of the proper amount to be tendered; *Ashmole v. Wainwright*, 2 Q. B. 837, 2 Gale & D. 217; *Jones v. Tarleton*, 9 M. & W. 675.

TINDAL, C. J. I am of opinion that the rule, that has been obtained in this case, to enter a verdict for the plaintiff, ought to be discharged. The question at issue seems to me to depend upon the consideration—upon which of the parties has the law cast the *onus* of estimating the amount of damage done to the owner of the land. The party whose sheep have trespassed, is, *in the first instance, the wrong-doer: it is therefore [795 upon him that the risk of estimating the amount of damage ought to rest, and not upon the party who has suffered by the trespass. If the owner of the cattle elects to make a tender of sufficient amends before the distress, and the distrainer refuses it, the latter becomes a wrong-doer; but a tender after distress does not entitle the owner to replevy his cattle. The rule of law cannot be more clearly stated than is done by Lord COKE in *The Six Carpenters' case*, 8 Co. Rep. 147:(a)—“Vide the book in 30 Ass. pl.

(a) The point decided in the *Six Carpenters' case* had been discussed and determined 139 years before, in H. 21 E. 4, fo. 19, pl. 22.

38, fo 179(a) *John Matrever's* case: it is held by the court, that, if the lord, or his bailiff, comes to distrain, and, before the distress, the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for *damage feasant*, if, before the distress, he tenders sufficient amends; and therewith agree, 7 Ed. 3, 8 b, (b) *In the Master of St. Mark's* case: and so is the opinion of HULL to be understood, in 13 Hen. 4, 17 b, (c) which opinion is not well abridged in title *Trespas*, 180. (d) Note, reader, this difference, that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful: tender after the impounding makes neither the one nor the other wrongful; for, then it comes too late, because then the cause is put to the trial of the law, to be there determined. But, after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *796] detinue for the detainer after, or he may, upon *satisfaction made in court, have a writ for the re-delivery of his goods." It appears to me, that, when the present plaintiff found he was too late to make a tender, so as to entitle himself to replevy the sheep and to succeed in an action of replevin, his proper course was, to make a tender of sufficient amends to cover the damage sustained; and, in the event of the defendant refusing to accept the sum tendered, and deliver up the sheep, he should have brought detinue; (e) for, they were held by the defendant merely as a pledge. In that case, the hazard of the sufficiency of the tender would fall, as it ought to do, on the owner of the cattle. It has been urged that here a tender was unnecessary, inasmuch as the sum demanded for compensation was exorbitant: that argument, however, as it seems to me, is answered by saying that the risk of determining the real amount of damage is not by law imposed upon the defendant. This I should be disposed to hold upon principle, and independently of the authority of *Linlon v. Hooper*, which I am unable to get over, and which I am not aware has been overruled: and, though cases have occurred in which it has been decided that an excessive demand dispenses with a tender, yet those were cases where the law made it incumbent on the defendant correctly to ascertain the amount of his demand. The cases of *Barrett v. The Stockton and Darlington Railway Company*, and of *Parker v. The Great Western Railway Company*, range themselves within this class. The cases of *Knibbs v. Hall* and *Skeate v. Beale* follow the doctrine of *Linlon v. Hooper*. Upon authority, therefore, as well as upon principle, I am of opinion that the verdict which has been entered for the defendant ought to stand.

*797] COLTMAN, J. I also think the law has, with sufficient distinctness, pointed out the course which the plaintiff *ought to have pursued.

(a) *Mantravers v. The Parson of Chase*.

(b) H. 7 E. 3, fo. 8, pl. 17.

(c) H. 13 H. 4, fo. 17, pl. 14.

(d) That is,—in Fitz. Abr. tit. *Trespas*, pl. 180. See the explanation in 6 Nev. & M. 613, &

(e) i. e. upon a tender before the impounding.

And, if he has brought a difficulty upon himself by departing from that course, he has no right to complain. The objection to bringing an action for money had and received, instead of tendering amends and replevying, is that which has been stated by my Lord Chief Justice, namely, that it would remove from the owner of the cattle the burden of ascertaining the precise amount of compensation due, and cast it upon the other party, who, in the absence of a tender, is no wrong-doer. The case differs essentially from that of *Parker v. The Great Western Railway Company*. There, the company, by refusing to carry the plaintiff's goods, without being paid an exorbitant sum, in contravention of the provisions of the acts of parliament by which their concerns are regulated, became wrong-doers. Nor can it be said that in this case the money was extorted by duress. Duress of goods implies an *unlawful* (a) detention of them, which has not occurred here, the sheep having been lawfully taken. I am unable to distinguish the present case from *Lindon v. Hooper*; and I know of nothing to prevent its being treated as a subsisting authority. For these reasons, I think the rule should be discharged.

MAULE, J. I also am of opinion that, under the circumstances of this case, money had and received is not the proper form of action. The defendant had an undoubted right to distrain the plaintiff's sheep, and to keep them until the damage done was satisfied. If a sufficient tender had been made before the impounding, the defendant would have been bound to restore them; otherwise not. The question is, whose duty it is to ascertain the amount of damage sustained. If that duty were by law cast upon the distrainer, it would *manifestly be throwing a very inconvenient [*798 burden upon the innocent party. It seems to me to be quite clear that this duty rests upon the party who inflicts, and not upon him who suffers, the injury. That being so, the defendant is not a wrong-doer because he may have too highly estimated the compensation due to him. It is said that the plaintiff ought to be permitted to maintain this action, because he is, under the circumstances, precluded from bringing a replevin. The reason why he has not that remedy, is, that he has sustained no wrong. His proper course was, to make a tender of sufficient amends; and, if the defendant, upon such tender, refused to restore the sheep, to bring an action of detainue, as suggested by Lord COKE in *The Six Carpenters' case*, 8 Co. Rep. 147. The case of *Anscomb v. Shore*, 1 Taunt. 261, where it was held that an action on the case lay not for the detention of the goods after a tender made of sufficient amends,—goes very far to show, that money had and received is not maintainable in this case; inasmuch as it shows that the distrainer was not a wrong-doer.

CRESSWELL, J. The plaintiff in this case has brought an action for money had and received by the defendant to his use. The defendant, in answer, says, the payment was made voluntarily, with full knowledge of all the facts, and therefore it is not recoverable back. On the part of the plaintiff it is

suggested that the payment was made under a species of duress—a wrongful detainer of his sheep. According to the rule laid down in *The Six Carpenters'* case, it appears that there has been no such wrongful detainer of the plaintiff's sheep. That ground therefore fails. The payment appears to me to have been made for the purpose of avoiding all question or dispute as to the right to distrain. The plaintiff cannot, therefore, now turn round and recover back the money which he so paid upon an adequate consideration. Rule discharged.(a)

(a) See *Closs v. Phipps*, 7 Mann. & Gr. 586, 8 Scott, N. R. 381.

MILLINGEN v. PICKEN. June 2.

Quere, whether a mechanical contrivance within the stem of a parasol, for raising or lowering it with one hand, is "a design for the shape or configuration of an article of manufacture," within the 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65.

By articles of agreement between A. & B., after reciting that A. had invented a parasol upon a new principle, it was agreed that B. should be permitted to manufacture it; and that, if B. should, pending the agreement, manufacture parasols without making the stipulated payments, or do any thing whatever to prejudice A.'s right and title to the invention, he should pay A. 100*l.* as liquidated damages.

In case for a breach of this agreement, the declaration alleged that A. was the proprietor of a new or original design for an article of manufacture, having reference to a purpose of utility, so far as the design was and is for the shape or configuration of such article, that is to say, of a new or original design for the shape or configuration of a parasol, for the purpose of opening and closing the same with one hand, and which design had not before or at the time of registration been published; that such design was duly registered according to the 6 & 7 Vict. c. 65; and that B. published a circular stating A.'s design to be an infringement of a patent previously granted to C.

B. pleaded, that A. was not, before or at the time of the registration, the inventor or proprietor of a new or original design for the shape or configuration of a parasol, not published before or at the time of the said registration, *modo et forma*.

Held, that this plea did not raise the question,—whether or not the alleged invention of A. was the proper subject of a certificate of registration under the statutes 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65.

ASSUMPSIT. The declaration stated that the plaintiff, after the passing of a certain act of parliament made and passed in the 7 Vict., (a) "to amend the laws relating to the copyright of designs," and before and at the time of the registration of the design *thereinafter mentioned, was, and from thence continually had been and then was, within the meaning and protection of the said act, the inventor and proprietor of a certain new or original design for an article of manufacture having reference to a purpose of utility, so far as the said design was and is for the shape or configuration of such article, that is to say, of a new and original design for the shape or configuration of a parasol, for the purpose of opening and closing the same with one hand; and which design had not, before, or at the time of, the registration thereof as thereinafter mentioned, been previously published: that the plaintiff, after the 1st of September, 1843,(b) and before

(a) 6 & 7 Vict. c. 65.

(b) The day appointed, by sect. 1, for the act to come into operation.

the making of the agreement thereafter mentioned, and before the publication of the said design, to wit, on the 20th of November, 1844, duly registered the said design, according to the said act of parliament, and also the name of the plaintiff as the proprietor of the said design, according to the said act ; and, by reason of the premises, the plaintiff, before and at the time of the making the agreement thereafter mentioned, was, and thence continually had been and then was, the proprietor of the said design, and of the copyright thereof: that, the plaintiff being such proprietor thereof, as aforesaid, thereupon, and before the commencement of the suit, to wit, on the 29th of November, 1844, by a certain agreement then made between the plaintiff of the one part, and the defendant of the other part—after reciting that the plaintiff had invented a parasol upon the principle of the same being opened and shut with one hand, (meaning thereby the said design of the plaintiff so registered as aforesaid,) and that the defendant was desirous of manufacturing the said parasol, which the plaintiff was willing that he should do, [•801 upon the understanding, and on the conditions, following—it was thereby agreed that the defendant should pay to the plaintiff the sum of 6*d.* for every parasol so manufactured by the defendant upon the principle aforesaid, that is, provided the plaintiff should charge the sum of 6*d.* to persons so manufacturing the said parasol, or, if any less or greater sum should be so charged to other persons, then the defendant should pay to the plaintiff half the price so charged to other persons for manufacturing parasols upon the principle aforesaid ; and it was thereby further agreed between the plaintiff and the defendant, that the defendant should purchase of the plaintiff metal tubes used in and about the manufacturing of the said parasols, to be charged to the defendant at the trade price, so that the same might operate as a check upon the number of parasols so manufactured by the defendant ; and it was thereby further agreed by and between the plaintiff and the defendant, that the defendant should not nor would at any time thereafter, for the term of seven years from the date thereof, manufacture parasols upon the principle aforesaid, without paying to the plaintiff the said sum of 6*d.*, or half the price so charged to other persons, as before mentioned, nor should the defendant do any thing whatever to prejudice the plaintiff's right and title to the said invention during the term aforesaid ; and that, should the defendant manufacture parasols upon the principle aforesaid without paying the plaintiff the said sum of 6*d.* for every parasol so manufactured, or half the sum so charged to other persons as before mentioned, or do any thing whatever to prejudice the plaintiff's right and title to the said invention during the term aforesaid, then the defendant should be liable to pay to the plaintiff 100*l.*, to be recovered by the plaintiff in any of her *majesty's courts at Westminster, as and for liquidated damages ; and the plaintiff, on his part, thereby agreed to [•802 permit the defendant to manufacture parasols as aforesaid, upon the terms and conditions thereinbefore mentioned, &c. : Mutual promises : Averment, that, although the plaintiff had always, since the making of the agreement,

performed and kept all things therein contained on his part to be performed and kept, and had always, since the making of the agreement, permitted and allowed the defendant to manufacture parasols upon the principle aforesaid, on the terms and conditions in the agreement mentioned, and had disclosed and discovered the said registered design, and the mode of constructing such parasols as aforesaid, to the defendant, yet the defendant, disregarding his said promise, after the making of the agreement, and during the term of seven years therein mentioned, which had not then expired, to wit, on the 30th of November in the year last aforesaid, and on divers other days, &c., wrongfully and unjustly did, and caused to be done, divers acts and things to prejudice the plaintiff's said right and title to the said invention during the term in the agreement in that behalf mentioned, contrary to his said agreement and promise, to wit, in this, that he the defendant, during the period, and on the several days and times last aforesaid, wrongfully and unjustly composed, lithographed, printed, delivered, and published to certain persons who respectively then and continually from thence carried on trade and business as makers and sellers of parasols, to wit, J. E., D. S., &c., divers, to wit, five hundred letters and five hundred notices, purporting to be respectively signed by one Joseph Barker, each of such letters and notices respectively stating and representing therein, in substance and effect, among other things, that the said J. Barker was advised that the said registered design of the plaintiff was a direct infringement of a patent of the said J. Barker's, that the said J. Barker

*803] *had been given to understand that the plaintiff was offering to grant licenses to various umbrella and parasol manufacturers to make what the plaintiff termed his invention, on the payment of a certain sum for each parasol manufactured, and that the said J. Barker was informed that the plaintiff had obtained from the defendant, on the plaintiff's assuring the defendant that the parasol so designed by the plaintiff as aforesaid, in no way affected his, the said J. Barker's patent, an agreement authorizing the defendant to make the plaintiff's said parasol, on payment of a license-due, but that, on the parasol being shown, it proved to be a direct infringement of the said J. Barker's rights, and that any person making, selling, or using parasols or umbrellas, on that or any other construction, which interfered with the said J. Barker's patent, would render themselves liable to an action at law for so doing; which composing, &c., respectively, of the said letters and notices respectively to the several persons aforesaid respectively, in manner aforesaid, at the several times in that behalf above mentioned, was calculated, and had a direct tendency to, and did in fact, prejudice and bring into disrepute and controversy the plaintiff's said right and title to the said invention within the meaning of the said agreement, and during the term therein in that behalf mentioned, and rendered the plaintiff's said right and title wholly doubtful, unmarketable, and unsaleable, and was designed, contrived, and intended by the defendant so to do, contrary to his said agreement, and the promise so

made by him as aforesaid: by means of the committing of which breaches of promise by the defendant as aforesaid, the several persons to whom the said letters and notices were respectively published as aforesaid, to wit, one J. E., one D. S., &c., were caused, and induced to believe, and then, and still did believe, that the plaintiff's said registered design was an infringement *of the patent of the said J. Barker, mentioned in the [804] said letters and notices, and that the plaintiff had no legal right or title to the said design, or to the copyright thereof; and divers persons, to wit, &c., &c., and others, who otherwise might and would have agreed with the plaintiff, and were about to do so, for licenses to make and sell parasols according to the said registered design of the plaintiff, for divers sums of money to be therefore paid by them to the plaintiff, had by reason of the committing of the said breaches by the defendant as aforesaid, wholly refused, and still refused so to do; and also, by reason of the said breaches committed by the defendant, divers, and very many persons who at the times aforesaid carried on, and still carry on, the trade and business of parasol makers and sellers, and amongst others, A. W., W. S., &c., who otherwise might and would have purchased of the plaintiff, and employed him to make for them respectively, a large number, to wit, 20,000 parasols, made according to the said registered design of the plaintiff, for large prices or sums of money to be therefore paid by them, in order that the said persons might afterwards sell and dispose of the same in the way of their respective trades and businesses, had been, and were, caused and induced to abstain, and had in fact abstained, from so doing, and the plaintiff had thereby lost all the profits which he might and would have made and derived therefrom, and the said registered design, which before the committing of the said breaches by the defendant was of great value to the plaintiff, to wit, of the value of 1000*l.*, had become, and was of no use or value to the plaintiff: by reason of the committing of which breaches by the defendant, the defendant afterwards, and before the commencement of the suit, to wit, on the 1st of January, 1845, also became and was liable to pay to the plaintiff the sum of 100*l.* in the said agreement mentioned.

*The defendant pleaded,—first, not guilty,—secondly, that the [805] plaintiff was not, before, or at the time of the said registration, the inventor or proprietor of a new or original design for the shape and configuration of a parasol, not published before or at the time of the said registration, *modo et forma*,—thirdly, that the defendant did not compose, print, &c., the letters and notices, as in the declaration alleged,—fourthly, that he was induced to enter into the alleged agreement, by fraud, covin, and misrepresentation,—fifthly, that one Joseph Barker was the true and first inventor of a certain new invention, to wit, of certain improvements in the construction or making of umbrellas and parasols; that, on the 29th of April, 7 Will. 4, and before the invention or registration of the design in the agreement referred to by the plaintiff, J. Barker obtained a patent for his invention, and that he duly enrolled a specification thereof, of which

the plaintiff, before the making of the agreement, had notice, that the defendant, before, and at the time of making the agreement and promise, was, and thenceforth continually had been, a manufacturer of parasols, in England, and that he and the plaintiff made and entered into the said agreement and promises respectively, with the object, and for the purpose of entitling the defendant to manufacture and sell, in England, parasols, upon the principle and according to the design and invention of the plaintiff, and not with any other object or purpose whatsoever, and that the term of three years from the time of the registration of the said design of the plaintiff, granted by virtue of the act of parliament in the declaration mentioned, and the said term of seven years, (except, with respect to the last-mentioned term, a small portion thereof less than one year, to wit, the last seven calendar months thereof,) will respectively expire and determine during the continuance, and long before the determination or end of the said

*806] term of *fourteen years in the said letters-patent mentioned; and that the said design and invention of the plaintiff was, and is a fraudulent and colourable imitation and counterfeit of the invention of J. Barker, mentioned and described in the letters-patent and specification respectively; and that the same could not, at any time during the continuance of the said term of fourteen years, and the powers and privileges of the said letters-patent, be applied to the manufacture of parasols, or in any way put in use or practice in England, &c., without fraudulently imitating, counterfeiting, and resembling the said invention of J. Barker, or without directly infringing the prohibitions of the letters-patent, and the powers and privileges granted thereby; that J. Barker never consented to, or authorized the registration of the said design by the plaintiff, or the applying of the said design to the manufacture of parasols, or the putting the same in use or practice in any manner whatsoever, but had always dissented from the same respectively; and that of such premises also the plaintiff, before, and at the respective times of the said registration, and the making of the agreement and promise of the defendant as in the declaration mentioned, had full notice and knowledge; that, before, or at the time of the making of the agreement and promise, the defendant had not any notice or knowledge that the plaintiff's said design and invention was such imitation and counterfeit as thereinbefore in that plea mentioned, but discovered the same,—believing the contrary thereof,—immediately after the making of the said agreement and promise, to wit, on the said day of making the same, as in the declaration mentioned, and had never at any time since making such discovery as last aforesaid, ratified or confirmed the said agreement or promise, but had always repudiated and rejected the same, and had never at any time applied the said design and invention of the

*807] plaintiff to the manufacture *of parasols, or in any way put the same in use or practice, or derived any benefit or advantage whatsoever from the said agreement, or the said design and invention of the plaintiff: verification.

The plaintiff joined issue on the first, second, and third pleas, and to the fourth and fifth—admitting the grant of the letters-patent to Barker, and the enrolment of the specification thereon, as in the fifth plea mentioned,—replied *de injuriâ, absque residuo causâ*.

Upon these replications the defendant joined issue.

The cause was tried before ERLE, J., at the adjourned sittings in London after last Hilary term. The plaintiff had obtained a certificate of registration, under the statutes 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65, for what he called “a new and original design for the shape or configuration of a parasol,” his alleged invention consisting of a mechanical contrivance, within the metal tube or stem of the parasol, to enable a person carrying it, to open or close the parasol with one hand only, by the mere pressure of the thumb on a small ivory knob inserted in the handle thereof. It also appeared that the defendant had, on the 29th of November, 1844, entered into the agreement stated in the declaration, and had been guilty of a breach of that agreement in the manner therein also stated: and several manufacturers of parasols, called on the part of the plaintiff, stated that they had been deterred from availing themselves of the plaintiff’s improvement by the publication, by the defendant, of the circular mentioned in the declaration.

On the part of the defendant it was objected, that the alleged invention of the plaintiff was not an invention of a design “for ornamenting an article of manufacture,” within the 5 & 6 Vict. c. 100, or “for the shape or configuration of such article” within the 6 & 7 Vict. c. 65, and therefore that it was not properly the subject of a certificate of registration under those statutes, but, if a new invention, and useful, was a mechanical invention, that might have been made the subject of a patent for a new manufacture, under the 21 Jac. 1, c. 3. [808]

It was further contended on the part of the defendant, that the plaintiff’s alleged invention was a breach of the patent granted to Barker, the specification of which was put in. Barker’s invention, however, required the application of both hands, and in other respects (according to the plaintiff’s witnesses) essentially differed in principle from the invention of the plaintiff. Evidence was also given on the part of the defendant to show that the parasol made by the plaintiff, so far as regarded the “shape and configuration” thereof, approached very nearly to one that had been previously made by one Sangster.

The learned judge told the jury that the only matter for their consideration was, whether or not the plaintiff’s invention was a fraudulent imitation of Barker’s: telling them that there was no plea upon the record to raise the question as to the novelty of the plaintiff’s invention.

The jury returned a verdict for the plaintiff, damages 150*l.*, (a) and leave was reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the invention was not the proper subject of a certificate under the acts relating to copyright of designs.

(a) The verdict was entered for 100*l.* only, the sum mentioned in the agreement.

Byes, Serjt., in Easter term last, moved to enter a nonsuit, or a verdict for the defendant upon the point reserved ; or for a new trial, on the grounds of misdirection, and that the verdict was contrary to the evidence : or to reduce the damages. As to the last point, he referred to *Astley v. Weldon*, 2 B. & P. 346, and *Kemble v. Farren*, 6 Bingh. 141, 3 M. & P. 425, to *809] show that the 100*l.* in the agreement *mentioned did not constitute liquidated damages : and he submitted, that, if unliquidated, they were extravagantly excessive.

TINDAL, C. J. If the 100*l.* mentioned in the agreement be liquidated damages, there is an end of the question as to the propriety of the verdict in point of amount ; and, if not, as the learned judge who tried the cause reports to us that he is not dissatisfied with the verdict, we cannot interfere as to the *quantum* of damages. Upon the other points, however, the rule may go.

Talfourd, Serjt., (with whom was *Hoggins*,) showed cause. This is not an action for the infringement of a patent, or for the piracy of a design certificated under the statutes referred to : it is an action in which the plaintiff seeks to recover damages for the breach of an agreement entered into upon good consideration. The validity of the certificate, on which the plaintiff's title to recover rests, depends upon the construction of the 5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 65. The first-mentioned act is intituled "An act to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture." The third section—"with regard to any new and original design (except for sculpture and other things within the provisions of the several acts mentioned in the schedule C. to the act annexed, (a) whether such design be applicable to the ornamenting of any article of manufacture, or of any substance, artificial or natural, or partly artificial and partly natural, and that whether such design be so applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable, whether by printing, or by painting, or by *810] embroidery, or by weaving, or by sewing, or by *modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical, or chemical, separate or combined"—enacts "that the proprietor of every such design, not previously published either within the United Kingdom of Great Britain and Ireland, or elsewhere, shall have the sole right to apply the same to any articles of manufacture, or to any such substances as aforesaid, provided the same be done within the United Kingdom of Great Britain and Ireland, for the respective terms hereinafter mentioned, such respective terms to be computed from the time of such design being registered according to this act ;" and it then proceeds to describe the several articles in classes, and to appoint the respective periods for which protection from piracy shall be given. The fifth section enacts "that the author of any such new and original design shall be considered the proprietor thereof, unless he has

(a) 38 G. 3, c. 71, and 54 G. 3, c. 56.

executed the work on behalf of another person for a good and valuable consideration ; in which case such person shall be considered the proprietor, and shall be entitled to be registered in the place of the author ; and every person acquiring, for a good or a valuable consideration, a new and original design, or the right to apply the same to the ornamenting any one or more articles of manufacture, or any one or more such substances as aforesaid, either exclusively of any other person, or otherwise, and also every person upon whom the property in such design, or such right to the application thereof, shall devolve, shall be considered the proprietor of the design in the respect to which the same may have been so acquired, and to that extent, but not otherwise." Section 15 directs the mode of registration of designs ; and section 16 provides for the certificate of registration, and enacts that such certificate, "purporting to be signed by the registrar or deputy-registrar, and purporting to have the seal of office of such registrar *affixed thereto, shall, in the absence of evidence to the contrary, [*811 be sufficient proof—of the design, and of the name of the proprietor, therein mentioned, having been duly registered—of the commencement of the period of registry—of the person named therein as proprietor being the proprietor—of the originality of the design—and of the provisions of this act, and of any rule under which the certificate appears to be made, having been complied with : and any such writing, purporting to be such certificate, shall, in the absence of evidence to the contrary, be received as evidence, without proof of the handwriting of the signature thereto, or of the seal of office affixed thereto, or of the person signing the same being the registrar or deputy-registrar." That statute appears to have been confined to the protection of *ornamental designs*. The 6 & 7 Vict. c. 65, was therefore passed for the purpose of extending its provisions. The first section recites the former act, and that it was expedient to extend the protection afforded by that act to such designs thereafter mentioned, *not being of an ornamental character*, as were not included therein : and the second section, "with regard to any new or original design for any article of manufacture, having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that whether it be for the whole of such shape or configuration or only for a *part* thereof," enacts "that the proprietor of such design not previously published within the United Kingdom, or elsewhere, shall have the sole right to apply such design to any article, or make or sell any article according to such design, for the term of three years, to be computed from the time of such design being registered according to the act : provided, that this enactment shall not extend to such designs as are within the provisions of the said act, or of the 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56." *That this in- [*812 vention might be made the subject of a patent, is not by any means conclusive to show that it is not the proper subject of registration under the statutes in question. [MAULE, J. Your argument is, that it was competent to the plaintiff, at his election, to call this an invention of a *design*, in

order to entitle himself to the more limited and less expensive patent right conferred by these statutes.] It is properly termed a design: sculpture is one of the arts of design, and indeed it is so recognised in the 5 & 6 Vict. c. 100, s. 3, where it is made the subject of an express exception. [CRESSWELL, J. This can hardly be said to be a mere *design* for the shape or configuration of a parasol. TINDAL, C. J. If your mode of construing the acts be the correct one, few inventions need be the subject of patents, provided the inventors are satisfied with a three years' monopoly.](a) It can scarcely be contended that this is a manufacture within the 21 Jac. 1, c. 3. If it be competent to the defendant, notwithstanding the agreement he has entered into, to raise the question of novelty at all, there is no plea, upon this record, adapted for that purpose. The plea relied on is the second, which alleges that the plaintiff is not the inventor or proprietor. If this had been an action for an infringement of a patent, the defendant would not, under such a plea, have been permitted to insist on want of novelty in the invention: *Walton v. Potter*, 3 Mann. & Gr. 411, 4 Scott, N. R. 91; *Walton v. Bateman*, 3 Mann. & Gr. 773, 4 Scott, N. R. 397. All that is thereby put in issue is, the plaintiff's proprietorship, which was proved by the plaintiff having produced the certificate of registration under the 5 & 6 Vict. c. 100, which is by section 16 made evidence of *proprietorship and of originality of design. As to the evidence—it was proved that the plaintiff's invention was altogether dissimilar from that which was the subject of Barker's patent. That required the application of both hands, in other respects it was a total failure. There is no pretence whatever for disturbing the verdict.

Byles, Serjt., in support of the rule. The issue is, not merely whether or not the plaintiff was the inventor of a new or original design for a parasol, but whether he is the proprietor; and that issue is properly raised here. With one exception—viz., that on which *Sykes v. Sykes*, 3 B. & C. 541, 5 D. & R. 292; *Morison v. Salmon*, 2 Mann. & Gr. 385, 2 Scott, N. R. 449, and that class of cases depends—since the statute of monopolies, no person can have a monopoly for any new invention but under the authority of some act of parliament. When the plea says that the plaintiff was not the inventor or proprietor of a new or original design, it in effect says that the plaintiff had no property in it—a plea that goes to the very root of the consideration. [TINDAL, C. J. You might have pleaded that the design was not a design for the shape or configuration of an article within the act, giving colour, so as to make the plea good. The issue tendered here is merely as to who is the first inventor. CRESSWELL, J. “Proprietor” and “inventor” do not mean the same thing. Under this plea you would seek to defeat the plaintiff's right by showing that he was not the *inventor*, or that he was not the *proprietor*, or that the design was not a design within

(a) Where the invention has been used abroad, a patent would be necessary, as the late acts do not extend to designs previously published within the United Kingdom or elsewhere. *Vide* 5 & 6 Vict. c. 100, s. 3.

the act. TINDAL, C. J. In *Neilson v. Harford*, 8 M. & W. 806, the court of Exchequer refused to permit the question of new *manufacture [814 to be raised under an issue on a plea that the plaintiff was not the first and true inventor.] The term proprietor is a word of more extensive meaning: the plea imports that the plaintiff was not the inventor or proprietor of such a design as could be the subject of a certificate of registration within the act. Suppose the action were for infringing the plaintiff's copyright in a book, might not the defendant, under a plea that the plaintiff was not the proprietor of the copyright, show that the publication was of a libellous, indecent, or blasphemous character? (a) [MAULE, J., and CRESSWELL, J. Clearly not.] The learned serjeant then proceeded to argue that the verdict was against the weight of evidence.

TINDAL, C. J. It seems to me that there is no pretence for making this rule absolute. I think the learned judge was fully warranted in telling the jury that there was no plea upon the record calculated to raise the question of novelty of the design. Nor do I think the jury came to a wrong conclusion upon the evidence.

The rest of the court concurred.

Rule discharged.

Byles, Serjt., then asked to be permitted to go down again, on payment of costs, with liberty to add a plea to raise the defence that was *bona fide* intended.

MAULE, J. What *bona fides* can there be in a man who sets up such a defence after having entered into such an agreement as that set out in this declaration?

Application refused.

(a) Vide *Wright v. Tallis*, post.

*NEEDHAM v. FRASER. May 31.

[815

A declaration in case, by A. against B., for not attending the trial of a cause between A. and C., in obedience to a *subpœna*, alleged that A. had a good cause of action against C., and that the testimony of B. was material for evidence for A. on that trial; and that, in consequence of such non-attendance, A. was compelled to withdraw the record, and become liable to pay to the then defendant the costs of the day, and also incurred costs in preparing for trial. B. pleaded—not guilty—leave and licence—and that A. might have proceeded to the trial without his testimony.

Held, that B. having admitted, by his course of pleading, that A. had a good cause of action against C., it was not competent to B. to avail himself of the record in that suit (which was put in by A. for the purpose of showing that such a record existed and had been withdrawn) to show that the declaration therein was so defective that a verdict thereon would have been fruitless.

THIS was an action upon the case against the defendant for not attending as a witness upon a trial at nisi prius, pursuant to a *subpœna*.

The declaration stated that the plaintiff brought an action in this court against one D., that the cause was at issue and about to be tried, and that he sued out a writ of *subpœna ad testificandum* directed to the now defendant, requiring him to give evidence in that action on behalf of the plaintiff.

it then alleged that the plaintiff afterwards, and before the committing of the grievances, &c., to wit, on, &c., caused to be made known and shown to the now defendant the said writ, and then caused a copy to be left with the now defendant, and then paid to the now defendant a certain sum of money, to wit, &c., being a reasonable sum of money, for his costs and charges in and about his attendance as a witness according to the tenor of the said writ of *subpoena*; that the said action came, and was called on to be tried at the said time, to wit, on, &c., and at the place mentioned in the said writ of *subpoena* for that purpose, and that he, the plaintiff, had a good cause of action in the said action; and, although the defendant could and might, in obedience to the said writ of *subpoena*, have appeared at the trial of the issue in the said action when the same was so called and came on to

*816] be tried as aforesaid, and could and might, in obedience to the said writ of *subpoena*, have testified the truth according to his knowledge, at the time and place aforesaid, at the said trial of the said issue, and although his testimony of the truth according to his knowledge was material evidence for the plaintiff at the trial of the said action, whereof the defendant then had notice; yet the defendant, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure the now plaintiff, and to deprive him of the benefit of the same evidence on the trial of the said issue, and thereby to prevent him from obtaining a verdict against D. thereon, and to make him, the now plaintiff, incur, and to put him to, great charges and expenses of his moneys, did not nor would appear as a witness at the time and place respectively mentioned in the said writ of *subpoena* in that behalf, at the trial of the said issue in the said action, when the same was so called and came on to be tried as aforesaid, although he the defendant was then and there solemnly called upon for that purpose, and had no reasonable or lawful cause or impediment to the contrary, but the defendant thereupon wholly neglected so to do; by reason whereof, and because the now plaintiff could not proceed to the trial of the said issue without the testimony of the now defendant, he the now plaintiff was then, to wit, on, &c., forced and obliged to withdraw, and did then withdraw, the nisi prius record of the said issue: by means of which several premises the now plaintiff then became and was made liable to pay to the said D. a large sum of money, to wit, &c., for the costs incurred by the said D. by reason of the said record being so withdrawn as aforesaid, and by reason of the said issue not being tried at the time and place aforesaid, and otherwise by reason of the premises; and the now plaintiff also lost and was deprived of the value and benefit of a large sum of money, to wit,

*817] &c., which he had paid and expended in order to have the said issue tried at the time and place aforesaid; and the now plaintiff was also obliged to expend, and did necessarily expend, divers other sums of money, in the whole amounting to a large sum of money, to wit, &c., in and about prosecuting the said suit; and the now plaintiff was, by means of the premises, otherwise greatly injured and damnified, &c.

The defendant pleaded—first, not guilty—secondly, leave and license—thirdly, that the plaintiff could and might have proceeded to the trial of the said issue without the testimony of the defendant; concluding to the country. Issue thereon.

The cause was tried before Lord DENMAN, C. J., at the last spring assizes for the county of Surrey. It appeared that the action against D. was brought to recover damages for defamatory matter alleged to have been uttered by him as counsel upon a motion in this court. The *nisi prius* record in that action having been put in on the part of the plaintiff, it was insisted for the defendant that he had a right to have it read, and that it would appear therefrom, as well as from the affidavits, (which *he* proposed to put in,) used upon the motion therein referred to, that the plaintiff had no cause of action against D.—the observations made by him being relevant to the matter then before the court, and not the subject of an action; and, consequently, that the plaintiff had not been damnified by his non-attendance as a witness.

On the part of the plaintiff it was insisted that it was not competent to the defendant to show that the plaintiff had no good cause of action against D., it being alleged in the declaration *that he had a good cause of action*, and that, in consequence of the absence of the now defendant, he was compelled to withdraw the record, and had become liable to pay certain costs; all which, it *was contended, was admitted by the defendant's course [818 of pleading.

His lordship inclined to the opinion that, upon this record, the defendant had admitted that the plaintiff had a good cause of action against D.; that the plaintiff had a right to bring his cause to trial, even though it might turn out that he had no substantial cause of action; that his being hindered and impeded in the exercise of this right, was, in itself, a ground of action; and that the defendant was, at all events, liable for the costs that had been incurred by reason of his culpable negligence.

A verdict was thereupon taken for the plaintiff, the amount of damages to be referred to the court.

Sir T. Wilde, Serjt., in Easter term last, obtained a rule nisi for a nonsuit or a new trial. He submitted that it was competent to the defendant in this action, to set up the want of a good cause of action by the plaintiff against D., as an answer to the imputed negligence; as, in an action against an insurance broker for negligence in omitting to effect, or in the mode of effecting, an insurance, the defendant may set up, in answer, any thing to show that his principal had no insurable interest, or for any other reason could have sustained no damage; and he referred to *Chapman v. Davis*, 3 Mann. & Gr. 609, 4 Scott, N. R. 319, and *Scholes v. Hilton*, 10 M. & W. 15, to show that the courts will not grant an attachment against a witness for disobedience of a *subpoena*, when it appears that the plaintiff had no cause of action in the original suit.

Shee, Serjt., showed cause. The declaration in this case states that the

plaintiff had a good cause of action against D.,—that the testimony of the
 *819] now defendant was *material for him on the trial of that action,
 and that, by reason of his non-attendance, he was compelled to withdraw the record, and incurred certain costs. These are material allegations, that might have been traversed: the plaintiff, by omitting to traverse them, has admitted the former cause of action, and the materiality of his evidence. The record was put in for the purpose of showing that it had been withdrawn: it clearly was not admissible for any other purpose; nor were the affidavits admissible to contradict it. It was not competent to the defendant to contend that the plaintiff had not sustained substantial damages by his non-attendance: and, at all events, the law will import *some* damage from the circumstance of his having been impeded in his right to have his cause tried. [MAULE, J. Your last proposition assumes that the allegation in the declaration, that the plaintiff had a good cause of action against D., was unnecessary.] The defendant cannot be permitted to controvert that which he has deliberately admitted upon the record; and, therefore, it must now be taken that the plaintiff had a good cause of action against D. The plaintiff does not want the record in the former action for the purpose of estimating his damages as against the present defendant, inasmuch as he is merely seeking to recover from him the amount of costs he has, by his negligence, become liable to pay to D., and the expenses that have thereby become unavailing.

Channell, Serjt., (with whom was *Bromwell*,) in support of the rule. It was clearly open to the defendant upon this record, to show that the plaintiff had no good cause of action against D. Every material allegation in a declaration that might have been, and is not traversed, is admitted: but here, the allegation that the plaintiff had a good cause of action against D., was immaterial and unnecessary; and therefore a plea traversing it
 *820] *would have been bad, as tendering an immaterial issue. It is true that the declaration in *Amey v. Long*, 9 East, 473, which is frequently referred to, contained an allegation that the evidence of the defendant would have enabled the plaintiff to obtain a verdict in the original action: but that was not the point decided. In *Masterman v. Judson*, 8 Bingh. 224, 1 M. & Scott, 367, it was held that the omission of such an averment was no ground for arresting the judgment. So, in *Mullett v. Hunt*, 1 Cr. & M. 752, there was no distinct allegation in the declaration, of a good cause of action in the original suit; but it was stated, (as is alleged in this declaration,) that the defendant could have given *material evidence* for the plaintiff, and that without his evidence the plaintiff could not safely proceed to trial, and that, by reason of his non-attendance, and because the plaintiff could not safely proceed to trial without his testimony, he was forced and obliged to, and did, withdraw the nisi prius record: and the declaration was held sufficient after verdict. Lord LYNDBURST, C. B., in the course of the argument, asks—"could the evidence be *material*, if the plaintiff had no cause of action? And in giving judgment, his lordship

said: "I am of opinion that a good cause is sufficiently averred, so as to be good after verdict. The declaration states that the evidence which the witness could have given was material evidence in the cause, and that the plaintiff could not safely proceed to trial without it. Now, in my opinion, no evidence could be material in the cause, unless the plaintiff had a good cause of action; and therefore, after verdict, I think we must hold the declaration sufficient in this respect. The averments in this case are substantially the same with those in the case of *Masterman v. Judson*; and I think that the present case falls within the principle of that decision."

*[MAULE, J. It may be that the declaration would have been good without the allegation in question, and yet, that being there, the allegation becomes material.] [*821] Where the action is brought for a tort, the plaintiff must show, not only a breach of duty on the part of the defendant, but a resulting damage to the plaintiff. Here, there could be no damage to the plaintiff, unless he had a good cause of action against D.(a) It is, therefore, competent to the defendant, under not guilty, to show, by the record in that action, that the plaintiff's cause of action was so viciously stated that he could not have succeeded there, and consequently that he has sustained no damage by the wrongful act of the present defendant. [CRESWELL, J. Does the declaration show any right to maintain the action, unless it, in some way, alleges that the plaintiff had a good cause of action in the original suit? And, if not, is not that allegation a material one? And should it not have been traversed?] In *Davis v. Lovell*, 4 M. & W. 678, 7 Dowl. P. C. 178, a declaration in case for disobedience to a *subpoena duces tecum*, alleged that, although the appearance of the defendant was necessary and material to the trial of the issue, and although the production of the documents was material evidence for the plaintiff on the said trial, yet the defendant, not regarding his duty, did not appear, &c.; and it was held, on general demurrer, that it was sufficiently shown that the plaintiff had a good cause of action in the original suit. And Lord ABINGER said: "As to the necessity of an averment that the plaintiff had a good cause of action in the original suit, I think the case of *Mullett v. Hunt* is an authority for our holding this declaration sufficient in that respect, and that the good sense of the matter is with the observation *of Lord LYNCHURST in that case,—that no evidence can be material in a cause, unless the plaintiff has a good cause of action; and therefore that it is sufficient to aver that the evidence of the party was material and necessary on the trial, and that, for want of it, the plaintiff was nonsuited. With this averment, the plaintiff could not support the declaration, unless he proved that he had a good cause of action in the original suit." Here, the third plea, which states that the plaintiff could and might have proceeded to the trial of the issue without the testimony of the defendant, does, according to the case last cited, put in issue all that is materially alleged in this declaration. If

(a) In relievin no rent can be due unless there be a tenancy; yet, a plea of *riens in arrears* admits the tenancy.

the defendant had simply traversed that the plaintiff had a good cause of action against D., the plea would have been demurred to, as tendering an immaterial issue. The record produced showed that, even if the plaintiff had obtained a verdict against D., the judgment would have been arrested. [MAULE, J. In that case, he would have been liable to no costs; whereas, here, having been compelled to withdraw the record in consequence of the absence of the witness, he is liable for the costs of the day.] At all events, the plaintiff is not entitled to recover the amount of the costs incurred by him in setting down the cause for trial, seeing that a trial could have resulted in no benefit to him.

COLTMAN, J.(a) I think it is impossible to hold otherwise than that the allegations in the declaration,—that the plaintiff had a good cause of action against D., and that the testimony of the now defendant was material evidence for the plaintiff at the trial of the aforesaid action,—are admitted upon this record; and, consequently, that the plaintiff is entitled to maintain this action. On the part of the defendant, it was sought to *put
*823] in the affidavits filed on the motion referred to in the declaration in the former suit, for the purpose of showing that the plaintiff had no good cause of action therein: but I think they were not admissible for the purpose of contradicting that which stands admitted by the pleadings. Then it was insisted, that the defendant was entitled to show, by the record in the action against D., which was put in by the plaintiff himself, that his cause of action was so defectively stated, that, even if he had succeeded in obtaining a verdict against D., the judgment must have been arrested. In all probability the declaration in the former action was insufficient: still, it appears to me that the present defendant is not entitled to raise that question, in the face of his solemn admission upon this record, that the plaintiff had a good cause of action against D. It is true, that, if it had in any way appeared upon the record in the present action that there was any inconsistency in the statement of the original cause of action, the effect might have been that contended for on the part of the defendant. But the record in the original action was sought to be used *as evidence* in this cause, not to explain any apparent inconsistency, but to show that the material allegations which the defendant has admitted upon this record are not true. This cannot be done. It follows, therefore, that, in my opinion, the plaintiff is entitled to recover all the costs he has been put to by the non-attendance of the defendant as a witness, that is, the costs he incurred in going down to a fruitless trial, and the costs he has become liable to pay to the opposite party in consequence of the withdrawal of the record. The rule must, therefore, be discharged, and the costs taxed upon the principle I have stated.

MAULE, J. I also am of opinion that this rule should be discharged. The
*824] action is brought against a witness *for not attending to give evidence upon a trial in obedience to a subpoena. The declaration states

(a) Tindal, C. J., was engaged on the crown jewels case.

that the plaintiff had a good cause of action in the suit, on the trial of which the defendant was called upon to give evidence ; that his testimony was material evidence for the plaintiff at the trial of the said action, and that, in consequence of his absence, the plaintiff was obliged to withdraw the record, and thereby became liable to pay certain costs to the defendant in that action, and also lost the benefit of certain expenses which he had incurred in order to have his cause tried : and the question now before us is, whether or not the plaintiff can maintain an action for any of these costs. The point argued before us has been, whether or not the declaration alleges, and the pleas admit, a good cause of action in the original suit. The declaration in effect alleges two causes of action—one, that the plaintiff has lost the benefit of the defendant's testimony to sustain a good cause of action which he had against the defendant in the former cause—the other, in respect to the loss of testimony of the witnesses which was material for him on that occasion. If these two allegations are the same, it is conceded that both are admitted by not guilty. I think they are equivalent allegations, and that they are just as much admitted as if the declaration had stated that the plaintiff had a good cause of action against the defendant in the former suit upon a bill of exchange, and also for goods sold and delivered, and that he had sued him upon those accounts, and that the now defendant, though duly subpoenaed, and though a material witness, failed to attend, and to this declaration the defendant had pleaded not guilty only. That would have been an admission that the plaintiff had a good cause of action as to both : and this case is substantially the same as that. The plaintiff here, having put in the record in the former suit, in order to show that it had been withdrawn, it was *contended, on the part of the defendant, that he was at liberty to use it for the purpose of inducing the jury to infer from the statements therein that the plaintiff had no cause of action against the original defendant. But I think it is quite clear that the defendant had no right to ask the jury to draw any inference that was inconsistent with his admission upon the record ; and that it made no difference that the evidence was put in by the plaintiff. That which the jury were sworn to try here was, whether or not the present defendant had been guilty of a breach of duty in not attending pursuant to his subpoena, not whether the plaintiff had a good cause of action in the original suit. That was not in dispute between these parties. I think, with my brother COLTMAN, that the defendant's liability was not limited to the costs he has paid, or become liable to pay, to the plaintiff upon the withdrawal of the record, but that he is also liable for the costs incurred by the plaintiff in setting down the cause for trial. [*825]

CRESSWELL, J. I am of the same opinion. The first point made upon the argument of this rule, was, that the plaintiff was not entitled to recover against the present defendant, unless he had a good cause of action against the defendant in the former action ; and that that was not shown here, because the allegation in the declaration " that the plaintiff had a good cause

of action in the said action," was not material, and, therefore, not admitted by the course of pleading. None of the cases that were cited support that position. In those cases it seems to have been held that it is enough to state that certain issues were joined, and that the evidence of the witness upon the trial of those issues was material; and that that is equivalent to an allegation that the plaintiff had a good cause of action. But surely, when there is a distinct allegation upon the record that the plaintiff had a *826] good cause of action, it must be a material allegation, and ought to be directly traversed, if the defendant means to rely upon the absence of a ground of action in the original suit. I agree with my brother MAULE, that, if two grounds of action are alleged here, the pleas admit both. Besides, the plaintiff may have had a right to try the issues joined, though he had no good cause of action. With respect to the evidence—if it was admitted upon the record that there was a cause of action in the former suit,—the record in that action was clearly not admissible for the purpose of contradicting that which stands admitted upon this record, notwithstanding that, for the purpose of showing that there was such a record, and that it had been withdrawn, it was put in by the plaintiff. Upon these grounds, I concur with the rest of the court in thinking that this rule should be discharged. I also think that the costs which the plaintiff is entitled to recover in this action, are those suggested by Lord DENMAN at the trial.

Rule discharged.

SCOTT and Another v. WATSON. June 5.

An objection that pleas delivered by a defendant under terms to plead *issuably*, are not *issuable* pleas, is waived by service of an order (a) for particulars of set-off.

SPECIAL assumpsit on a ship-building contract; with an *indebitatus* count for work and labour.

The defendant, being under terms to plead *issuably*, on the 19th of May delivered six pleas, one of which was a special plea of set-off.

On the 20th of May, the plaintiffs served the defendant with a summons for particulars of his set-off; and on the following day an order for particulars *827] was made by consent and served. On the 23d, the plaintiff's attorney gave the defendant's attorney notice that the order for particulars was abandoned; and on the same day, he signed judgment as for want of a plea, on the ground that certain of the pleas delivered were not *issuable* pleas.

Byles, Serjt., on a former day, obtained a rule nisi to set aside the judgment, on the ground that the plea objected to was *issuable* within the rule, being a substantial answer to the action, and also on the ground that the

(a) *Quære* whether service of the summons for such particulars was not an equally *binding* recognition of the pleas.

objection to the pleas, if a valid one, was waived by the order obtained for particulars of set-off.

Channell, Serjt., showed cause. He cited several cases for the purpose of showing that two, at least, of the pleas were not such as could be pleaded by a party under terms to plead issuably: and he submitted that the plaintiffs had not precluded themselves, by obtaining the order for particulars of set-off, from objecting that the pleas were not issuable; citing *Ford v. Bernard*, 6 Bingh. 534, 4 M. & P. 302, and *Trott v. Smith*, 9 M. & W. 765 [MAULE, J. By serving the order for particulars of set-off, you consented to treat the pleas as pleas that might properly be pleaded.] The plaintiffs were entitled to the information they asked, to enable them to lay instructions before counsel.

Byles, Serjt., (with whom was *Crompton*,) contra, was stopped by the court.

TINDAL, C. J. The particulars of set-off would not enable you to see whether the pleas were issuable or not. The attorney must be presumed to know whether *or not the pleas are such as the defendant is entitled to plead. [°828]

The rest of the court concurred.

Rule absolute.

FAY v. PRENTICE and Another. June 7.

A declaration in case stated that the defendant, being possessed of a messuage adjoining a garden of the plaintiff, erected a cornice upon his messuage, projecting over the garden, by means whereof rain-water flowed from the cornice into the garden, and damaged the same, and the plaintiff had been incommoded in the possession and enjoyment of his garden:—

Held, that the erection of the cornice was a nuisance from which the law would infer injury to the plaintiff; and that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice and the commencement of the action:—

Held, also, that the declaration was not to be construed as alleging a trespass.

CASE, for erecting a cornice at the side of the house of the defendant Prentice, projecting over the garden of the plaintiff.

The declaration stated that the plaintiff, before and at the time of committing the grievances thereafter mentioned, was, and from thence until the commencement of the suit, had been, and still was, lawfully possessed of a certain messuage, garden-ground, land, and premises, with the appurtenances, situate, &c., in which messuage the plaintiff and his family had for and during all the time aforesaid resided and dwelt, and still resided and dwelt; that the defendant Prentice, before and at the time of the committing of such grievances, was, and from thence until the commencement of the suit had been, and still was, possessed of a certain messuage, situate, &c., contiguous and adjoining to the messuage, garden-ground, land, and premises of the plaintiff: nevertheless, the defendants, well knowing the premises, but contriving, and *wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in the possession, use, &c. [°829]

occupation, and enjoyment of his said messuage, &c., and to render the said garden-ground damp and wet, and to injure and destroy the trees, shrubs, bushes, plants, herbs, and flowers therein, and to prevent the due and proper growth of the said trees, shrubs, &c., and to render them of little or no use or value to the plaintiff, whilst the plaintiff was so possessed of the said messuage, &c., with the appurtenances, and so resided and dwelt in the messuage of the said plaintiff with his family as aforesaid, and whilst the defendant Prentice was so possessed of his said messuage as aforesaid, to wit, on the 1st of May, 1844, wrongfully and injuriously put, placed, and built, and caused and procured to be put, placed, and built, a certain cornice and projection in and upon the messuage of the defendant Prentice, near to and projecting over the garden-ground of the plaintiff, and wrongfully and injuriously kept and continued the same cornice or projection so put, placed, and built, and caused and procured to be put, placed, and built, in and upon the messuage of the defendant Prentice, for a long space of time, to wit, until the commencement of the suit: by means of which several premises, afterwards, to wit, on, &c., and on divers other days and times between that day and the commencement of the suit, divers large quantities of rain-water ran, flowed, and fell from the said cornice or projection on the messuage of the defendant Prentice, down to, into, upon and against the said garden-ground of the plaintiff, and upon the trees, shrubs, &c., growing and being in the said garden-ground, and upon the gravel walks thereof, and greatly injured, wetted, and damaged the said garden-ground of the plaintiff, and dirted and spoiled the gravel walks of the said garden-ground; and, by reason of the premises, the plaintiff had
 *830] been greatly annoyed and incommoded in the use, possession, and enjoyment of his messuage, garden-ground, land, and premises, and the same thereby became and were greatly damaged, deteriorated, and lessened in value, &c.

The defendants pleaded—first, not guilty—secondly, leave and license. The plaintiff joined issue on the first plea, and traversed the leave and license.

The cause was tried before TINDAL, C. J., at the sittings in Middlesex after last Hilary term. It appeared that the defendant Prentice was possessed of a messuage adjoining the messuage and garden of the plaintiff, and built up to the extreme boundary of his own land, and that, in the beginning of May, 1844, he caused to be erected thereon (by the other defendant, a builder) an ornamental cornice, which projected about fourteen inches over the plaintiff's garden. The case attempted to be made out on the part of the plaintiff was, that the plants and gravel-walk in his garden were injured by the dripping of rain from this cornice; and some of his witnesses stated, that, in the event of the cornice being permitted to remain up so long as to give the owner of the house a right to keep it there, the value of the plaintiff's premises would be thereby diminished to the extent of 100%, inasmuch as he would be prevented from building to the extremity

of his land. Upon cross-examination, none of the witnesses would undertake to state that any rain had fallen upon the plaintiff's garden from the time of the erection of the cornice down to the commencement of the action—the 2d of July, 1844.

It was thereupon insisted, on the part of the defendants, that, as the grievance of which the plaintiff complained in his declaration was the causing the rain-water to flow from the cornice on to the plaintiff's garden, the evidence did not sustain it, no such inconvenience as *that complained of having, in fact, been sustained by the plaintiff, down to the time of the commencement of the action. [*831

His lordship refused to nonsuit the plaintiff, but reserved the point: and he left it to the jury to say whether or not the plaintiff had been injured by the dripping of rain from the defendant's cornice, upon his garden, or by reason of the projection itself; which latter he inclined to think gave a cause of action, inasmuch as the plaintiff would be thereby prevented from building to the extremity of his own land, if so minded.

The jury returned a verdict for the plaintiff, damages 40s.

Sir T. Wilde, in Easter term, obtained a rule nisi to enter a nonsuit, on the ground suggested at the trial. He cited Comyns's Digest, title *Action upon the Case for a Nuisance*, (A.); Bacon's Abridgment, title *Action upon the Case*, (C.); *Penruddock's case*, 5 Co. Rep. 101; *Sneade v. Radley*, 3 Bulstr. 74; *Iveson v. Moore*, 1 Lord Raym. 486, 1 Salk. 16; *Jackson v. Pesked*, 1 M. & Selw. 234; *Shadwell v. Hutchinson*, M. & M. 350; *Taylor v. Bennett*, 7 C. & P. 329; and *Tucker v. Newman*, 11 Ad. & E. 40, 3 P. & D. 14. [TINDAL, C. J., referred to *Acton v. Blundell*, 12 M. & W. 324.

Shee, Serjt., (with whom was *Warren*,) now showed cause. There was ample evidence from whence the jury might properly infer that the particular injury alleged in the declaration had occurred, viz., the dripping of the rain on the plaintiff's garden; which, according to *Baten's case*, 9 Co. Rep. 53 b, is enough to sustain the action. There, Henry Baten, and Elizabeth his wife, brought a *quod permittat*, (a) against George Sampson, to prostrate *a house in the parish of St. Clement's Danes, which the said George wrongfully, and without judgment, had built, *ad nocu-* [*832
mentum liberi tenementi nuper J. P. et modo præd. Henrici et Eliz. in jure ipsius Eliz., &c., and declared that the said J. P. was seised of a messuage in the Strand, in the said parish, in fee, and, being so seised, the said George, ult' Octob. anno 41 Eliz., wrongfully and without judgment, erected upon his freehold a house, so near the said messuage *nuper præd. J. P. et modo ipsorum Henrici et Eliz.*, *sic quod orientalis pars ejusdem domus ipsius Georgii superpendet, Anglicè*, doth jut over, the said messuage late of the said J. P., and now of the said Henry and Elizabeth, *in latitudine* 17 inches, and *in longitudine* 17 feet, *ad nocuementum liberi tenementi ipsorum Henrici et Eliz. in eadem*, &c.; to their damage of 100l.. upon

(a) See F. N. B. 123, &c.

which the defendant demurred in law. It was objected, amongst other things, "that the plaintiffs have declared generally *ad nocumentum*, and have not assigned any nuisance in certain, to wit, that the rain fell from the said house newly built, upon the plaintiff's house, or that the windows are stopped, by which he loses the light, &c.; as in 4 Ass. 3,(a) and 4 E. 3, 36 a, b, *Richard de Dalby's case*,(b) the plaintiff in the *quod permittat* showed the manner of the nuisance, to wit, when the smoke entered into the said houses; so that no man could live there." But it was resolved "that the plaintiffs need not in this case assign any special nuisance; for, here, it appears to the court that it is to the plaintiff's nuisance; for, this case differs from all the said cases; for, in this case the defendant has built a new house, which overhangs part of the plaintiff's house, so that, of necessity, the rain which falls from the new house must fall upon the plaintiff's house. Also *cujus est solum, ejus est usque ad cælum*. And *833] *therewith agrees 13 H. 8, 1,(c) and by the over-building upon part of the house of the plaintiffs, he has deprived them of the air; also he has prevented them from building their house higher: and that which appears to the court, need not be averred; for *lex non requirit verificare quod apparet cur.*; Plow. Com. 87 b." The circumstances alluded to in that resolution, were distinctly presented to the attention of the jury here. On the motion *Penruddock's case* was cited, for the purpose of showing that there must be actual damage to entitle the plaintiff to recover. That case, however, is no authority for such a position. The law infers damage whenever a man's rights are encroached upon. [MAULE, J. That is not now in question: it was left to the jury to say whether the plaintiff sustained actual damage by the falling of rain or by the projecting cornice.] The declaration discloses a good ground of action independently of the falling of rain. There are many cases in which reversioners have been allowed to maintain actions for the obstruction of a watercourse, or a right of common, or the like, though no actual damage could be shown. In *Williams v. Morland*, 2 B. & C. 910, LITTLEDALE, J., says: "In trespass for a wrongful entry into the land of another, a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So, in the case of an action for the obstruction of a right of common, or a right of way, any obstruction of that right is a sufficient cause of action. The doing of any act calculated to injure that right, is a sufficient ground of action: but, generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case." In *Tucker v. Newman*, 11 Ad. & E. 40, 3 P. & D. 14, it was *834] *held that building a roof with eaves which discharged rain-water by a spout into adjoining premises, was an injury for which the reversioner might recover damages while they were under demise, if the jury thought there was a damage to the reversion. *Jackson v. Peshel*,

(a) 4 Ass. fo. 6, pl. 3.

(b) *Douby v. Berch*, M. 4 E. 3, fo. 26.(c) *Rather*, M. 14 H. 8, fo. 1, pl. 1, *ut videtur*.

1 M. & Selw. 234, is to the same effect: it was not alleged there that that which was complained of was an injury to the plaintiff's reversion; but it was conceded in argument that a reversioner may maintain case for a permanent encroachment on his rights. In *Jesser v. Gifford*, 4 Burr. 2141, which was an action upon the case for erecting a wall whereby the plaintiff's lights were obstructed, a rule nisi having been obtained to arrest the judgment, on the ground that the action would not lie by a *reversioner*, the act being only an injury to the person in possession—ASTON, J., cited a case of *Tomlinson v. Brown*, E. T. 1755, which was an action brought by the owner of the inheritance, for a nuisance in obstructing lights and breaking his wall. A general verdict having been found for the plaintiff—NORTON, in arrest of judgment, objected that a temporary nuisance cannot be an injury to the inheritance; it may be abated before the estate comes into possession: and he cited *Some v. Barwisk*, Cro. Jac. 231, and observed, that, if this would hold, the defendant would be liable to a double action—one by the possessor of the estate—the other by the reversioner. CROULE showed cause on behalf of the plaintiff, and insisted that it was a damage done to the inheritance; for, if the reversioner wanted to sell the reversion, this obstruction would certainly lessen the value of it. And the court were of opinion that the action might be brought by one, in respect of his possession, and by the other, in respect of his inheritance for the injury done to the value of it. LORD MANSFIELD and the rest of the court held that *authority to be decisive. In *Barker v. Green*, 2 Bingh. 317, 9 J. B. Moore, 584,(a) which was an action against the sheriff for not arresting a party on mesne process, the court held that the law would presume damage from a breach of duty. In *Williams v. Mostyn*, 4 M. & W. 145, where *Barker v. Green* seems to have been overruled, PARKE, B., refers to the doctrine of HOLT, C. J., in *Ashby v. White*, 2 Ld. Raym. 938, that “every injury to a right imports a damage, in the nature of it, though there be no pecuniary loss. [MAULE, J. I think there is no doubt that trespass would lie here: but, can the plaintiff maintain case without showing some consequential damage?] In *Pickering v. Rudd*, 1 Stark. N. P. C. 56, it was doubtful whether or not *trespass* would lie for the erection by a party of a board projecting over his neighbour's land, at a considerable distance from the surface; but no one doubted that *case* might have been maintained. If it be necessary, there was evidence whence the jury were warranted in inferring actual damage, though it was not distinctly proved that rain had dripped from the cornice to the plaintiff's land, before the commencement of the action.

Tulfourd, Serjt., in support of the rule. It is not disputed that case will lie for a permanent injury to the plaintiff's right, upon a declaration aptly framed. But the question here is, whether any such injury (apart from the falling of rain) is suggested upon this record as will entitle the plaintiff to maintain this action. Striking out the allegation as to the dripping of the

(a) See the remarks of Parke, B., upon this case, 4 M. & W. 164.

rain upon the plaintiff's garden, that which remains is a mere allegation of a trespass. You cannot disengage the damage resulting from the trespass, from the trespass itself, so as to make it the subject of another form
 *836] of action. Suppose the defendants had put up a pipe over their own land, in such a manner that it would only in very wet weather incommode the plaintiff; the plaintiff, clearly, could not have brought an action until some actual damage had occurred. [MAULE, J. The lord chief justice seems to have left it to the jury to say whether or not the plaintiff had sustained any actual damage by the falling of rain, or by being prevented from building to the extremity of his own land, as he had a right to do—carefully excluding from their consideration all question as to damage which the law would imply.] The real question is, whether this action could be sustained without the *per quod*. In *Iveson v. Moore*, 1 Lord Raym. 492, 1 Salk. 16, Lord Holt says, that, where the action is maintainable of itself without the *per quod*, the damages need not be shown certainly; but that, if the *per quod* is the ground of the action, there the damages ought to be shown certainly and specially. Here, the ground of action is, not the possibility of future injury to the plaintiff's title by this wrongful assertion of a right, but the immediate injury resulting from the rain dripping from the cornice on to the plaintiff's garden. If it had appeared that the plaintiff had intended to build, or to dispose of his interest in the premises, and had been prevented, by the erection of this cornice, from doing either, that undoubtedly would have given him a right of action: so, if it had appeared that the plants in his garden, or the gravel-walks, had been injured by the dripping of rain from the cornice, he would have had a cause of action: but, in either case, the declaration must have shown definitely and precisely what it is that is complained of. The declaration here alleges the latter only as the gravamen; and, therefore, evidence was not properly admissible
 *837] to show a diminution in value of the premises in a supposed event; nor should it have been left to the jury upon the question of ideal damage that might possibly result to the plaintiff at some future period, if the alleged nuisance were permitted to continue.

COLTMAN, J.(a) The question left by the lord chief justice to the jury, was, whether the plaintiff had sustained any actual damage either from the dripping of rain from the cornice, or from the overhanging of the cornice itself. With regard to the former part of the direction, there certainly was evidence whence the jury might fairly infer damage to the plaintiff from that cause. So far, therefore, the direction was correct. Then, as to the cornice, if that was incorrectly put to the jury, the verdict could not be allowed to stand, inasmuch as we could not see the precise ground upon which they came to the conclusion they did. The question then is, whether the allegations in the declaration are such as to justify the submitting that point to the jury in the manner it was. In order to try that, let us strike out of the declaration the allegation as to the dripping of rain; and then

(a) Tindal, C. J., was engaged on the crown jewels case.

there remains simply an allegation that the defendants wrongfully and injuriously built, and caused and procured to be built, a certain cornice and projection, near to, and projecting over, the plaintiff's garden-ground, and that, by reason of the premises, the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his messuage, garden-ground, &c., and the same thereby became and were greatly deteriorated and lessened in value. Now, my brother *Talfourd* contends that evidence as to damage resulting to the plaintiff from the projection of the cornice, apart from rain, was not admissible, there being no allegation in the declaration to warrant it: for, that the statement as to the erection of the cornice must be considered as a mere allegation of a trespass, for which the plaintiff could not recover any damages in this form of action. It was not contended at the trial that that amounted to a trespass; nor was it so put by Sir *T. Wilde*, on moving for the rule. Supposing it, however, to be conceded that that would amount to an act of trespass—which is opposed to the opinion of Lord *ELLENBOROUGH*, in *Pickering v. Rudd*, 1 Stark. N. P. C. 56—by reason of the presumption of law, *cujus est solum, ejus est usque ad cælum*, there is nothing to show that the plaintiff had, or claimed, a right so extensive as that: and it is mere matter of fact. There is nothing, therefore, in this declaration that necessarily shows that the building of the cornice amounted to a trespass; and, consequently, I see no ground for saying that the evidence that was received was improperly admitted, or that the case was improperly left to the jury. *Baten's* case, 9 Co. Rep. 53 b, has considerable bearing on the present. It was there alleged that the defendant erected a house at the extremity of his land so as to project or jut over the house of the plaintiff, *ad nocumentum liberi tenementi ipsorum*: and the court resolved that the plaintiffs need not assign any special nuisance; for, it appeared to the court that it was to their nuisance. So, here, the mere fact of the defendants' cornice overhanging the plaintiff's land, may be considered as a nuisance to him, importing a damage which the law can estimate. And, if so, it is quite unnecessary, as I apprehend, to lay special damage in the declaration. For these reasons, I am of opinion that there is no ground for disturbing the verdict.

MAULE, J. I also am of opinion that this rule should be discharged. The jury were directed by the lord chief justice to consider whether or not actual damage had been caused and procured to be done by the defendants to the plaintiff, from the dripping of rain from the cornice, or by the projection itself. It was conceded, on the part of the defendants, that the dripping of rain from the defendants' cornice upon the plaintiff's land, would give a cause of action; but it was objected that there was no evidence that any damage from rain had occurred, inasmuch as it was not proved that any rain had fallen between the time of the erection of the cornice and the commencement of the action. There was, however, no evidence negating the possibility of rain having fallen during that interval. Then, as to the damage from the projection of the cornice—was

there any thing incorrect in the direction on that point? The declaration alleges that the defendants wrongfully and injuriously built, and caused to be built, a certain cornice and projection in and upon the house of the defendant Prentice, near to, and projecting over, the garden-ground of the plaintiff, and wrongfully and injuriously kept and continued the same, &c., by means of which several premises divers large quantities of rain-water ran, flowed, and fell from the said cornice or projection on the messuage of the defendant Prentice, down to, into, &c., the garden-ground of the plaintiff, and wetted and damaged the said garden-ground, &c., and by reason of the premises the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage, garden-ground, &c., and the same thereby became and were greatly damaged, deteriorated, and lessened in value. That allegation is not, in point of construction, limited to injury arising from the falling of rain, but comprehends all actual injury, whether arising from rain or otherwise, by means of the erection of the cornice. The expression "actual injury" seems to have been used by

*840] the lord chief justice to exclude "such injury as the law would imply; and in that respect I should say the case was left more favourably for the defendants than it should have been. The allegation of general annoyance is not to be restricted by the special annoyance previously stated: we must construe the words of a declaration in the largest sense they will reasonably admit of. It was urged, on the part of the defendants, that, as the erection of the cornice was an act of trespass, and the damage is stated in general terms, the plaintiff must be considered as complaining (*ultra* the rain) of a trespass; and, therefore, in leaving the case to the jury, the declaration should have been construed as if it had not contained any thing about the trespass. I agree, however, with my brother COLTMAN, in thinking that this declaration does not allege a trespass, and that it was not so intended. The maxim *cujus est solum, ejus est usque ad coelum*, is not a presumption of law, applicable in all cases, and under all circumstances: for example, it does not apply to chambers in the inns of court. It may be that the arrangement of the adjoining property in this case is such as to make the building of the cornice by the defendants no trespass as against the plaintiff. The declaration does not complain of a trespass, but only of the injurious consequences resulting to the plaintiff from an unauthorized use by the defendants of their property: and, by abstaining from demurring, the defendants agree that the declaration is to be so understood. (a) Taking, therefore, the declaration to allege something that is actionable in respect of consequential damage, it seems to me that there was actual damage other than from the dripping of rain, and that the evidence of such damage was admissible upon this record, and the question properly left to the jury.

CRESSWELL, J. The declaration in this case discloses that which is the

*841] subject-matter of an action upon the case, both as respects the falling of rain upon the plaintiff's garden, and the overhanging of the

cornice erected by the defendants. The introduction of the particular allegation of damage from the dripping of rain, does not exclude evidence of general damage resulting from the erection of the nuisance. In *Baten's* case the court say that damage was necessarily to be presumed from the overhanging of the defendant's house over the house of the plaintiffs. So, here, in the absence of evidence to the contrary, it must be presumed that the projecting of this cornice over the plaintiff's garden is a nuisance and an injury to him. I therefore think the lord chief justice was right in leaving the case to the jury with the double aspect; and that such direction was fully justified by the facts; and, consequently, that this rule must be discharged.

Rule discharged.

WILLIAMS v. CURRIE. June 7.

In actions for tort, the court will not interfere with the damages found by the jury, unless they appear to be grossly disproportioned to the injury sustained. Where, therefore, a landlord caused considerable injury to the crops of his tenant by selling, felling, and removing timber, without applying for leave to enter, and the jury assessed the damages at 300*l.*, the court refused to interfere, although the net value of the entire crops did not exceed 200*l.*

TRESPASS, quare clausum fregit. The declaration stated that the defendant, with force and arms, on the 1st of April, 1844, and on divers other days and times between that day and the 29th of September, 1844, broke and entered divers, to wit, three closes of the plaintiff, in the parish of Edmonton, in the county of Middlesex, called, respectively, the sixteen acres, the ten acres, and the one acre, and one other close of the plaintiff, [842 situate and being partly in the parish of Enfield, in the county aforesaid, and partly in the parish of Edmonton aforesaid, and called the nine acres, and then with the feet of divers, to wit, 200 persons, in walking, and with the feet of divers horses, &c., and the wheels of divers carts and carriages, trod down, trampled upon, consumed, and spoiled the grass of the plaintiff, of great value, to wit, of the value of 200*l.*, then there growing and being, and then broke down, prostrated, and destroyed a great part, to wit, 200 perches of the hedges, and 200 perches of the fences, of the plaintiff, of and belonging to the said closes respectively, and also then cut down and felled divers, to wit, 200 oak trees of the plaintiff, then there growing and being, and cast, threw down, and laid, and caused to be cast, thrown down, and laid, divers, to wit, 200 oak trees, of great size, in and upon the said closes, and kept and continued the same so cast, thrown down, and laid, for a long time, to wit, from the time when the same were so cast, thrown down, and laid, to the 29th of September, 1844, and thereby and therewith, during all the time last aforesaid, greatly encumbered the said closes respectively, and injured the grass of the plaintiff there then growing and being, of great value, to wit, of the value of 200*l.*, and hindered and prevented the plaintiff from having the use, benefit, and enjoy-

ment thereof in so large and ample a manner as she might and otherwise would have done; and that by means thereof the plaintiff had not only lost the profit and advantage which would otherwise have accrued to her from making divers large quantities of hay, to wit, 500 tons, of great value, to wit, &c., which the plaintiff would otherwise have made from the said grass, but also lost the profit and advantage of enjoying the after-crops, *843] which the plaintiff would otherwise have enjoyed, in and upon the said closes, and which would have been of great value, to wit, &c.; and other wrongs, &c.

The defendant paid 50*l.* into court, pleading no damage *ultra*.

The plaintiff replied that she had sustained damage to a greater amount than 50*l.*; whereupon issue was joined.

The cause was tried before CRESSWELL, J., at the sittings at Westminster after the last term. The facts were as follow:—The plaintiff was tenant to the defendant of four closes of grass-land, situate in the parishes of Edmon-
don and Enfield, and containing about thirty-seven acres, for a term which expired at Michaelmas, 1844. The trespasses complained of were committed in the months of April, May, and June, in that year, when a number of men employed by the plaintiff entered the closes in question, which were then laid up for hay, for the purpose of felling timber trees. The trees, about 100 in number, were oak, ash, and elm, of considerable size, some standing in the hedge-rows, but most of them standing dispersedly about the fields. About twenty persons were employed, at various times, in felling, lopping, and barking the trees, and stacking the fagots and bark, and considerable damage was done thereby to the hedges. Three sales took place—two in May, and a third in June; these sales being attended by a large concourse of people, who followed the auctioneer from tree to tree, necessarily thereby doing considerable damage to the grass. The removal of the trees, fagots, and bark was not completely effected until the 28th of September.

Evidence was given as to the presumed value of a first and second crop of hay, the result of which appeared by the learned judge's note to be, that, but for the trespasses complained of, the crops might have yielded a profit of about 200*l.*

*844] In submitting the case to the jury, the learned judge told them that the plaintiff was not to be permitted to make a market of a grievance; but that they were not necessarily to limit the damages by the amount of pecuniary injury sustained.

The jury returned a verdict for the plaintiff, damages 250*l.* beyond the sum paid into court.

Shee, Serjt., on a former day in this term, obtained a rule nisi, (which was granted with some reluctance,) for a new trial, on the ground that the damages were excessive.

Byles, Serjt., showed cause. This is not a case in which the court will interfere. The courts have always been slow to enter upon these dis-

sions, in actions of tort. In *Perkin v. Proctor*, 2 Wils. 386, the report states, that, "as to the damages, the Lord Chief Justice WILMOT was pleased to say, he wished they had been 40*s.* instead of 40*l.*; that he thought there was a foundation for the jury to have lessened them, but they thought otherwise, and they (he said) are the constitutional judges as to damages; and there must be some very extraordinary conduct in a jury to induce the court to meddle with damages." In *Merest v. Harvey*, 5 Taunt. 442, this court held, that, upon a declaration for breaking the plaintiff's close, treading down his grass, and hunting for game, and other wrongs, 500*l.* were not excessive damages for a trespass in sporting, persevered in in defiance of notice, and accompanied with indecent and offensive demeanour. GIBBS, C. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages. To be sure, one can hardly
[*845] "conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner; is the trespasser to be permitted to say—'here is a half-penny for you, which is the full extent of all the mischief I have done?' Would that be a compensation? I cannot say that it would be." And HEATH, J., mentioned a case where a jury gave 500*l.* damages for merely knocking a man's hat off; and the court refused a new trial. In *Sharpe v. Brice*, 2 W. Blac. 942, which was an action of trespass against a custom-house officer for a search,—which turned out to be unsuccessful,—for prohibited and uncustomed goods, the jury returned a verdict for the plaintiff, with 500*l.* damages: and, upon a motion for a new trial, PERROT, B., who tried the cause, reporting the damages to be very excessive, and that he advised an application for a new trial, DE GREY, C. J., said: "It has never been laid down that the court will not grant a new trial for excessive damages in any cases of tort. It was held so long ago as in Comb. 357, that the jury have not a despotic power in such actions. The utmost that can be said, is, and very truly, that the same rule does not prevail upon questions of tort as of contract. In contract, the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in *torts* a greater latitude is allowed to the jury; and *the damages must be excessive and outrageous
[*846] to require or warrant a new trial." His lordship then referred to the peculiar circumstances of the case; and the rule was discharged. In *Eliot v. Allen*, ante, p. 18, (a) which was an action of trespass for assault—

(a) In *Eliot v. Allen*, (which was a case for one shilling damages,) the jury returned a verdict for 400*l.*, which was reduced, by the advice of the court, to 200*l.*

ing and imprisoning the plaintiff in the workhouse, and putting upon him a strait waistcoat, this court did interfere; but the circumstances of that case are such as hardly to justify its being considered a precedent. The facts of this case well warranted the jury in giving the amount of compensation they have given. The trespass was of a very aggravated description, very injurious to the plaintiff, and committed by the defendant for his own profit.

Shee, Serjt., (with whom was *Mellor*,) in support of the rule. The courts have in many instances interfered where excessive damages have been given in actions of *tort*. In acceding to this application, the court will not in any degree impugn the rule laid down by DE GREY, C. J., in *Sharpe v. Brice*, or by GIBBS, C. J., in *Merest v. Harvey*. The jury have not, as was said in the former case, a despotic power in such actions: they must be restrained within wholesome limits. There were no circumstances of aggravation in this case; no deliberate intention to injure or annoy the plaintiff. Assuming the extravagant calculation of the plaintiff's witnesses to have been correct, it is quite clear that the entire crop of hay was not lost. In *Prior v. Severn*, 7 Bingh. 316, 5 M. & P. 125, where the jury, in an action of trespass for an assault and false imprisonment, gave 100*l.* damages, and the judge who tried the cause, at the conclusion of his report stated that he *847] should have been better satisfied if the jury had limited their verdict to 20*s.* The court directed a new trial. There never, perhaps, was a case of *tort* which so closely approached to a mere matter of computation as the present.

COLTMAN, J. (a) I must confess I think the jury took a somewhat exaggerated view of the damage sustained by the plaintiff in this case. Still, acting upon the principle laid down by DE GREY, C. J., in *Sharpe v. Brice*, we must allow the jury a greater degree of latitude in an action of this sort than would be proper in a case of contract. If 200*l.* damages had been given in the whole, I should not have thought it unreasonable; and therefore I do not think an excess of 100*l.* ought to induce us to take away from the jury a prerogative that the constitution has invested them with.

MAULE, J. I also am of opinion that this rule should be discharged. It appears that the defendant was the owner of the land, and the plaintiff his tenant, and that her term had not expired when the trespasses complained of were committed. If the defendant had asked leave to go upon the land for the purpose of felling the trees, the lowest terms upon which he could have expected to obtain it would have been, that he should compensate his tenant to the full amount of the damage that might be done to the ground. If we were to hold that the jury, in estimating the damages for an unlicensed trespass of this sort, are to be restrained to exactly the amount of the injury sustained by the plaintiff, it would in effect be placing a wrongdoer upon precisely the same footing as one who enters with the owner's permission. Besides, it is to be observed that this was not the case of a

(a) Tindal, C. J., was engaged on the crown jewels case.

single act of trespass, but of a series of trespasses *persisted in day after day, and for several weeks; and that this was done for the pecuniary profit of the defendant. When, therefore, we consider that the acts of which the plaintiff complains were not only detrimental to the plaintiff, but profitable to the defendant, and that the verdict does not very much exceed the amount of actual damage proved, (a) I think we should be usurping the legitimate province of the jury if we were to interfere. [*848]

CRESSWELL, J. I have arrived at the same conclusion with the rest of the court, not, however, without some difficulty. There certainly was nothing in the conduct of the jury to indicate haste or intemperance. I told them to give the plaintiff such reasonable damages for the trespasses complained of, as, in their judgment, would be a fair compensation for the injury and inconvenience she had sustained; telling them, at the same time, that they were not necessarily to restrict themselves to the actual amount of the loss of crops proved by the witnesses. In cases of this sort, it is not to be expected that a jury will measure their verdict so nicely as in cases of contract; and therefore it is exceedingly difficult for the court to draw the line at which their interference ought to stop. I do not think the damages are so extravagant as to justify us in submitting the case to a second jury.

Rule discharged.

(a) The amount of actual damage would appear to be, the net presumed value of the two crops of hay in case the trespasses had not been committed, minus their actual net value, of which no proof seems to have been given, (*supra*, 843.) To this actual damage the jury would reasonably add damages for the several unlicensed entries.

*SHEPHERD v. SHEPHERD. June 10.

[*849]

In debt on a promissory note, by payee against maker, the declaration, after showing that the writ issued on the 17th of May, 1845, alleged that the defendant, on the 25th of March, 1844, made his note in writing, and thereby promised to pay to the plaintiff or order 690*l.* on the 25th of March, 1845, which day had expired before the commencement of the suit, and then delivered the note to the plaintiff; and that thereupon the defendant then agreed to pay the amount of the said note to the plaintiff, *on request*.

Special demurrer, assigning for causes that the declaration was double and inconsistent, and that it was uncertain whether the plaintiff intended to rely on an express or an implied agreement:—

Held, that the declaration was sufficient.

Duplicity is no objection to a count.

DEBT, on a promissory note, by payee against maker.

The declaration stated that the defendant was summoned to answer the plaintiff, by virtue of a writ issued on the 17th of May, 1845—for that whereas the defendant, on the 25th of March, 1844, made his promissory note in writing, and thereby promised to pay to the plaintiff or his order 690*l.* on the 25th of March, 1845, which day had expired before the commencement of the suit; and then delivered the said note to the plaintiff; and thereupon the defendant then agreed to pay the amount of the said note to plaintiff, *on request*; whereby, and by reason of the non-payment of the

said sum of money, an action had accrued to the plaintiff to demand and have of and from the defendant the said sum of money; yet the defendant had not paid the said sum, or any part thereof, to the plaintiff's damage of 10*l*.

Special demurrer, assigning for causes, amongst others, that the declaration was double and inconsistent, in this, that, in one part, it stated an agreement to pay the sum of 690*l*. *on the 25th of March, 1845*, and, in another part, an agreement to pay the same sum *on request*; and also that it was uncertain whether the plaintiff intended to rely on an express or an implied agreement, and, if on the latter, that there was no sufficient consideration stated for such agreement.

*850] *Joinder in demurrer.

A judge at chambers having made an order setting aside the demurrer as frivolous,

Byles, Serjt., on a former day, moved to rescind that order. He submitted that the count disclosed two causes of action—the one upon the promissory note, the other upon the agreement to pay the debt upon request; and that it was no answer to the objection—when pointed out as cause of special demurrer—that the latter was surplusage. He referred to *Hart v. Longfield*, 7 Mod. 148; *Hart v. Langfeld*, 2 Lord Raym. 841. There, the plaintiff declared, that whereas, on such a day and year, the defendant was indebted to him in such a sum for nourishing E. L. at the request and instance of the defendant, and that he the defendant promised to pay him: there was also a *quantum meruit* for nourishing the said E. L. for the same time. On demurrer it was objected, that the first declaration being an *indebitatus* for nourishing of E. L. for such a time, there is likewise a *quantum meruit* for the same nourishing, and it is contradictory that there should be one agreement to pay so much as it should be worth, and another to pay a sum uncertain, (a) and both stand. And HOLT, C. J., said: “There cannot be two agreements, and both stand for the same thing at the same time; for, in such case, the last will destroy the first, and the last will only stand; but the way had been to aver them to be different children; and that is the right way, when a *quantum meruit* and *indebitatus* is brought for the same thing; for, here you ought to multiply E. L. as often as you multiply your declaration.”

The court—*Dowling*, Serjt., for the plaintiff, consenting—directed that
*851] the demurrer should be placed “at the head of the special paper; and accordingly it now came on to be argued.

Byles, Serjt., in support of the demurrer. The declaration is bad in substance, as well as in form. No debt is shown. [MAULE, J. The declaration states that the money became due on a day *certain*, before the commencement of the action.] There is no allegation that the days of grace, of which the court will take judicial notice, had expired before action brought: the declaration merely states that the note was payable on

(a) Meaning probably “a sum in certain.”

the 25th of March, 1845, and that that day had expired before the commencement of the suit. Suppose the action had been commenced on the 26th of March? [MAULE, J. It appears upon the face of the declaration, that the writ issued on the 17th of May.](a) If that be sufficient, the allegation, "which period has now elapsed," required by the form given in the rule of Trinity term, 1 Will. 4, is surplusage: and yet, in *Abbott v. Aslett*, 1 M. & W. 209, Tyrwh. & Gr. 448, 4 Dowl. P. C. 759, 1 Gale, Exch. 405, the court of Exchequer seem to have considered those words material; for, they held a declaration bad for not alleging that the time for payment had elapsed before the commencement of the suit. [MAULE, J. It may very well be that those words are unnecessary, where the day of payment is stated with certainty, and not under a *vide licet*, so that the court may see that the bill or note had arrived at maturity before the commencement of the suit. The case put by PARKE, B., seems to me to sustain this declaration. He says: "The suing out of the writ is now the commencement of the suit, and those forms are therefore no longer correct. In the old forms of *declarations on bills of exchange, if the date of the bill was stated with certainty, it was sufficient to show that it was payable a certain time after the date; but, if the day were laid under a *vide licet*, it was necessary to allege that the time for payment had elapsed before the commencement of the suit, or the exhibiting of the bill." By this declaration it does appear that the note was due on the 28th of March, 1845; and that that day had passed before the commencement of the suit.] The date of the suing out of the writ may be omitted when the issue is made up. [MAULE, J. The forms (b) appended to the rules of Hilary term, 4 W. 4, require it to be inserted.] The declaration is, at all events, deficient in what the old books call the grace and beauty of pleading, viz., singleness. Lord HOBART observes, in *Slade v. Drulee*, Hobart, 295: "LITTONETON says that the pleading is the honourable, commendable, and profitable part of the law, and by good desert it is so: for, cases arise by chance, and are many times intricate, confused, and obscured, and are cast into form, and made evident, clear, and easy, both to judge and jury, (which are the arbitrators of all causes,) by good and fair pleading. So that this is the principal art of law; for, pleading is not talking; and, therefore, it is required that pleading be true; that is the goodness and virtue of pleading; and that it be certain and single, and that is the beauty and grace of pleading. Therefore, the law refuseth double pleading, and negative pregnant, though they be true, because they do inveigle, and not settle the judgment upon one point." And a pleading is not the less double, because the part wherein consists the duplicity is ill pleaded.(c)

(a) The declaration, as delivered and as pleaded to, would not allege the date of the writ of summons; supposing it to have been originally demurrable, it appears to be made good by *matter ex post facto*.

(b) *Quære*, whether these forms apply to issues in law.

(c) See Stephen on Pleading, 3d ed. pp. 259—261, where a distinction is taken between *matter ill pleaded*, and *immaterial matter*.

*853] [MAULE, J. Does that apply to a declaration?] There *seems no good reason why it should not. In *Stephens v. Underwood*, 4 N. C. 655, 6 Scott, 402, a plea to an action against the acceptor of a bill of exchange, that the defendant made the acceptance by force and duress of imprisonment, and that he never had any value for accepting or paying the bill, was held bad for duplicity. TINDAL, C. J., there said: "It appears to me that this plea is bad for the cause assigned in the special demurrer, viz., 'that it contains two separate and distinct matters of defence, to wit, that the acceptance of the said bill was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment, and that there never was any value or consideration for the said acceptance.' The answer set up is, that it is not bad, because the second ground of defence is badly pleaded: but the plea is not the less double because one of the grounds of defence is badly pleaded. In Comyns's Digest, title '*Pleader*,' (E. 2,) it is laid down that 'a double plea is bad, though one matter or the other be not well pleaded: as, in trespass, if the defendant pleads *molitor manus imposuit* and a release, it is double, though the release be not well pleaded: (a) though but one of the several matters pleaded be material.' (b) Here, notwithstanding the second branch of the plea would be ill on special demurrer, yet the entire plea is ill for the cause assigned." In *Purssord v. Peek*, 9 M. & W. 196, to assumpsit on a bill of exchange drawn by one S. B., upon, and accepted by the defendant, for 25*l.*, payable three months after date, the defendant pleaded, that, after the bill became due, and before the commencement of the suit, to wit, &c., the said S. B. paid to the plaintiff divers moneys, to the amount of 17*l.*, and did for the plaintiff work and labour to the value of 8*l.*, in full satisfaction and

*854] discharge of the sum of money in *the bill specified, and of all damages sustained by the non-payment thereof, which were then accepted and received by the plaintiff in such full satisfaction and discharge; and, further, that he the defendant accepted the bill at the request and for the accommodation of the said S. B., and not otherwise; and that there never was any consideration or value for the payment by the defendant of the said bill, or any part thereof, and that the plaintiff, at the time of the commencement of the suit, held, and now holds the said bill without any consideration or value whatever: and the plea was held bad for duplicity. Lord ABINGER said: "The language used at the conclusion of the plea, that the plaintiff held the bill without value, renders it double; and, although that may be badly pleaded as an answer to the action, yet the plea is nevertheless demurrable on that ground." And PARKE, B., said: "If the allegation had been, that the plaintiff had never held for value, the plea would clearly have been double; and it is not the less so that the latter part is badly pleaded." Here, the declaration alleges two distinct promises,—the one, the promise contained in the note itself,—the

other, a promise made after the note became due, which latter would, at all events, be an account stated.

Dowling, Serjt., *contra*, was stopped by the court.

TINDAL, C. J. I think this declaration is sufficient, notwithstanding the causes of demurrer assigned. It contains a distinct allegation, not under a *vide licet*, that, on a precise day, the defendant made his promissory note in writing, and also a distinct allegation of a promise to pay the amount to the plaintiff or his order on a precise day; and it goes on to say "which day had expired before the commencement of this suit." This latter was a perfectly unnecessary allegation, inasmuch as we can see upon the face of the record that the writ issued long after the note became due. [*855] After the statement that the defendant *then* delivered the note to the plaintiff, (which, taking it at the letter, is a possible case of circumstances,) comes another allegation which is equally surplusage,—“and thereupon the defendant then agreed to pay the amount of the said note to the plaintiff, on request.” That is mere matter of legal inference: and I see no objection to it. It is said, however, that the declaration is ill for duplicity; and that it is not the less double because one of the matters which constitute the duplicity is informally pleaded. That may be the rule in the case of a plea; but no authority has been cited to show that it equally holds in the case of a declaration. The argument, as it seems to me, seeks to give an undue effect to that which is mere matter of legal inference from the premises before alleged. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

COLTMAN, J. As I understand the declaration, it alleges that the defendant, on the 25th of March, 1844, made his promissory note, and then delivered the note to the plaintiff, and that thereupon the defendant then, that is, on that day, agreed to pay the amount of the said note to the plaintiff, on request. That was altogether a void promise, and one that could give no ground of action. It may therefore be treated as surplusage. If all that part to which I have referred is omitted, the declaration discloses a clear and substantial cause of action. I am not aware that the insertion in a declaration of a void promise necessarily renders it bad, provided a sufficient cause of action remains. The plaintiff must have judgment.

MAULE, J. I also think this declaration sufficient. It appears by the record that the plaintiff commenced his action on, and not before, [*856] the 17th of May, 1845. It further appears that the defendant, on the 25th of March, 1844, made his promissory note in writing, payable on the 25th of March, 1845, and that, at the time he made the note, the defendant delivered it to the plaintiff: and the conclusion stated necessarily follows, that, by reason of the non-payment of the sum mentioned in the note, an action accrued to the plaintiff to demand and have of and from the defendant the said sum of money. It is objected that the declaration is double, because it further alleges a promise by the defendant to pay the money *on request*; and cases of duplicity in pleas have been referred to, for

the purpose of showing that a plea is not the less liable to the objection of duplicity because one of the matters of defence is badly pleaded. The sense, however, in which a plea or subsequent pleading is bad for duplicity, is not the sense in which a declaration is bad for being double. A plea is bad if it offers two substantial answers to the declaration: so, a replication, or a rejoinder, is bad, if it gives two substantial answers to the plea, or the replication, to which it is an answer. But a count is not bad because it contains two or more causes of action. There cannot be a doubt that a declaration showing the defendant to be indebted in so much on a bond, and so much on a covenant, and so much on another bond and another covenant, though in a certain sense double, would not on that ground be bad: yet, if one could conceive each of these matters to amount to an answer to an action, stating the whole, or any two of them, would undoubtedly make a plea double. A declaration may, however, be bad for stating one cause of action twice over; for instance, stating two breaches before the statute 8 & 9 W. 3, c. 11. The same thing must not be asked for on two distinct grounds. In such a case, the declaration is not so much double as disputative. It is in that sense that *this declaration must
 •857] be bad, if objectionable at all: for, there might be some colour for the objection, if the declaration had shown two separate causes of action. The word "then" is not to be referred to the time at which the note became payable, but to the 25th of March, 1844. The subsequent allegation of an agreement to pay the amount of the promissory note *on request*, when it appears by the declaration to have been payable twelve months after date, is merely void. For these reasons, I am of opinion that the declaration is not open to any substantial objection; and, consequently, that the plaintiff is entitled to judgment on this demurrer.

CRESSWELL, J. I am of the same opinion. By reference to the dates,—which are not laid under a *videlicet*,—it sufficiently appears, that, by reason of the non-payment of the promissory note, an action had accrued to the plaintiff before the issuing of the writ,^(a) to demand and have of and from the defendant the sum of money in the note mentioned. The allegation of an agreement to pay *on request* is mere surplusage. In *Owen v. Waters*, 2 M. & W. 91, in an action on a bill of exchange, by the drawer against the acceptor, the declaration alleged that the bill was made on the 29th of March, payable four months after date, "which period has now elapsed;" and it was held that the declaration was sufficient, and that it was not necessary to aver that the four months had elapsed "before the commencement of the suit." *Abbott v. Aslett* was there referred to. The case of *Galway v. Rose*, 6 M. & W. 291, seems to me fully to bear out the view taken by my brother MAULE.

Judgment for the plaintiff.

(a) Supra, 851 (a).

*COCKING v. WARD. June 12.

[*858]

Held, that an agreement respecting the transfer of an interest in land, required by the statute of frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected and nothing remains to be done but to pay the consideration: but that when, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered in a count upon an account stated.

A count in assumpsit stated that A. was the occupier of a farm, as tenant to one V.; that B., the defendant, was desirous of renting the farm from V., and had applied to and requested A. to surrender, and relinquish possession thereof, to V., and to endeavour to prevail upon V. to accept of such surrender, and to accept B. as tenant in lieu of A.; and that, in consideration that A. would surrender, and relinquish possession of, the farm to V., and would also apply to V. and endeavour to prevail upon him to accept of such surrender, and to accept B. as tenant in lieu of the plaintiff, B. promised to pay A. 100*l*. when he should become such tenant. It then averred that A. did surrender, and relinquish, &c., and did apply to and endeavour to prevail upon V. to accept of such surrender, and to accept B. as tenant in lieu of A.; and that V. accepted the surrender, and accepted B. as tenant; but that B. refused to pay the 100*l*.—*Held*, that this was a contract for an interest in or concerning lands; and therefore that the special count could only be proved by a note or memorandum in writing, in conformity with the fourth section of the statute of frauds. But,

Held, that A. was entitled to recover the 100*l*. upon a count to an account stated, upon proof that B. had, since he obtained possession of the farm, acknowledged his liability, and promised to pay that sum.

ASSUMPSIT. The first count of the declaration stated, that the plaintiff, before and at the time of the making of the promise by the defendant thereafter next mentioned, was possessed of, and was the occupier of, a certain farm, lands, and premises, with the appurtenances, as tenant thereof, from year to year, to one G. H. Vernon, and remained and continued such tenant until a certain day, to wit, the 25th of March, 1842; that, before and at the time of the making of the said promise, the defendant was desirous of taking and renting the said farm, &c., of and from the said G. H. Vernon, and had thereupon applied to and requested the plaintiff to surrender and relinquish possession of the said farm, &c., to the said G. H. Vernon, on the said 25th of March, 1842, and also to apply to, and endeavour [859] to prevail upon, the said G. H. Vernon to accept of such surrender, and also to accept the defendant as tenant of the said farm, &c., in lieu of the plaintiff, from the said 25th of March, 1842; that thereupon afterwards, and whilst the plaintiff's tenancy was still subsisting, to wit, on the 1st of August, 1841, in consideration that the plaintiff *would surrender* and relinquish possession of the said farm, &c., to the said G. H. Vernon on the said 25th of March, 1842, *and would apply* to the said G. H. Vernon, and *endeavour to prevail upon him to accept of such surrender, and also to accept the defendant as tenant* of the said farm, &c., in lieu of the plaintiff, from the said 25th of March, 1842, the defendant promised the plaintiff to pay her 100*l*. when and as soon he the defendant should become such tenant to the said G. H. Vernon as aforesaid, in lieu of the plaintiff, as aforesaid: Averment, that afterwards, and after the making of the said promise, to wit, on the 25th of March, 1842, the plaintiff, confiding in the said promise of the defendant, and in hopes of his faithful performance thereof, did surrender and relinquish possession of the said farm, &c., to the said G. H. Vernon,

from the day and year last aforesaid, and did also then, to wit, on the day and year last aforesaid, apply to the said G. H. Vernon, and endeavour to prevail upon him to accept of such surrender, and also to accept the defendant as tenant of the said farm, &c., in lieu of the plaintiff, from the day and year last aforesaid; and although the said G. H. Vernon did afterwards, to wit, on the day and year last aforesaid, accept of such surrender, and did also then accept the defendant as such tenant aforesaid, in lieu of the plaintiff; and although the defendant did afterwards, to wit, on the day and year last aforesaid, said, enter upon and take possession *of the said farm, &c., and then

*860] become tenant thereof to the said G. H. Vernon, in lieu of the plaintiff; yet the defendant did not nor would, although often requested so to do, when he so became and was accepted as such tenant as last aforesaid, or at any other time, pay to the plaintiff the said sum of 100*l.*, or any part thereof, but, on the contrary thereof, then and still did wholly neglect and refuse so to do, and the same and every part thereof was still wholly due and unpaid, &c.

There was also a count upon an account stated.

The defendant pleaded—first, non assumpsit, to the whole declaration—secondly, to the first count, that the plaintiff did not apply to, and endeavour to prevail upon, the said G. H. Vernon, to accept the defendant as tenant of the said farm, &c., in the declaration mentioned, in lieu of the plaintiff, in manner and form as in the declaration alleged; concluding to the country.

Issue thereon.

At the trial before COLTMAN, J., at the last Summer assizes for Nottinghamshire, the following facts appeared. The plaintiff was in possession of a farm which her deceased husband had for some years occupied under Mr. Vernon, and was about to relinquish it. The defendant, who was the occupier of an adjoining farm, being desirous of obtaining possession of the plaintiff's farm, promised the plaintiff, that, if she would give up possession at Lady-day, 1842, and would induce the landlord to accept the defendant as tenant in lieu of the plaintiff, he would pay her 100*l.* The plaintiff thereupon communicated to Mr. Vernon her intention to quit at Lady-day, and asked him to accept the defendant as tenant. The plaintiff, accordingly, quitted the farm at the time mentioned, and the defendant became tenant. When requested to pay the 100*l.* according to his promise, the defendant admitted his liability, and asked for time, saying he would pay it

*861] when he got the *valuation of his own farm; which, it appeared, he had since obtained.

On the part of the defendant, it was submitted that the agreement, if any existed, being for the sale of an interest in land, it could not be proved by parol testimony.

For the plaintiff it was insisted, that the contract being *executed*, it might be proved by parol; and it was further contended for the plaintiff, that there was, at all events, sufficient evidence of an account stated.

A verdict was taken for the plaintiff, damages 100*l.*; leave being reserved to the defendant to move to enter a nonsuit, or a verdict for him, if the

court should be of opinion that there was not sufficient evidence to sustain the verdict upon either count.

Sir *T. Wilde*, Serjt., in Michaelmas term, accordingly obtained a rule nisi to enter a nonsuit, or a verdict for the defendant; or for a new trial, on the ground that the evidence did not sustain the promise alleged in the declaration. He cited *Buttmere v. Hayes*, 5 M. & W. 456; (a) *Price v. Leyburn*, Gow's N. P. C. 109; and *Mayfield v. Wadsley*, 3 B. & C. 357, 5 D. & R. 224. [MAULE, J., referred to *Griffith v. Young*, 12 East, 513.]

Channell, Serjt., (with whom was *Wood*,) in Easter term, showed cause. The consideration in this case is *executed*; and therefore the objection that the special count could only be proved by a memorandum or note in writing that would satisfy the statute of frauds, does not arise. The contract declared on does not show any stipulation for the conveyance, by Mrs. Cocking to the defendant, of any interest in land. [CRESSWELL, J. It points to a surrender or relinquishment by her, of an interest *in land [862 in favour of the defendant.] The mere surrender of the farm to the landlord (b) would not fix upon the defendant any liability to pay the 100l.: the money was to be paid only in the event of the defendant obtaining possession of the farm through the plaintiff's intercession. When he obtained possession the contract was executed. The statute only applies to the case of a contract between the immediate parties. [TINDAL, C. J. The words of the statute are very general: "No action shall be brought upon any contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, shall be in writing," &c. Is not this an agreement to surrender the possession of the land? And is not that a contract involving an interest in or concerning lands?] This case is precisely within the principle of *Price v. Leyburn*. It was there ruled that the statute 29 Car. 2, c. 3, s. 4, does not invalidate an executed *parol* contract, so as to prevent a party to it from maintaining an action for a breach of it, where the breach does not relate to an interest in land, although the contract itself stipulates that the defendant should be substituted as tenant, in the stead of the plaintiffs, of the premises then in their occupation. DALLAS, C. J., there says: "The plaintiffs do not seek to enforce a *parol* contract respecting land. The foundation of this action is, the breach of an engagement which has no relation to an interest in land. Besides, the contract is executed; and therefore, I think, the objection is not well founded." In many cases a party is precluded from maintaining an action upon an executory contract, where, if the consideration be executed, an action will lie. In the former part of this *declaration, the consideration stated is undoubtedly an execu- [863 tory one: but, taking the whole declaration together, it discloses a contract completely executed, so far at least as the plaintiff is concerned.

(a) As to which, see 6 Mann. & Gr. 54.

(b) The surrender being before the late statutes, 6 & 7 Vict. c. 76, and 8 & 9 Vict. c. 186, did not require a deed; but it required a note in writing under the statute of frauds. The only surrender in this case would be the acquiescence by the plaintiff in the demise to the defendant.

In *Griffith v. Young*, 12 East, 513, a tenant having agreed with his landlady, that, if she would accept another person for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the good-will, if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognisant of this agreement: it was held that he was liable to the landlady in an action for money had and received for her use—the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land. And Lord ELLENBOROUGH said: “If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if, indeed, it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other. I was misled at the trial by having my attention called to the statute of frauds; when in truth the question was wholly collateral to it.” [CRESWELL, J. That proceeds upon the ground that money paid for the purpose of being handed over to a third person, is money had and received to the use of such third person.] In *Buttmere v. Hayes*, 5 M. & W. 456, the whole contract between the parties had relation to the sale of an interest in land. But here, that which the statute requires to be evidenced by writing forms a small part only of the subject-matter of the contract, and is only introductory to •864] that which was to entitle the plaintiff to claim the 100*l.* “The defendant, having had the full benefit of the contract, cannot now turn round and say that the plaintiff is not entitled to recover, because one of the stipulations was executory in its character, and only to be evidenced by a note in writing. [TINDAL, C. J. I know of no authority for splitting the consideration, in the way you suggest.] In *Hallen v. Runder*, 1 Cr., M. & R. 266, 3 Tyrwh. 959, A. having occupied a house as tenant to B. in which there were certain fixtures which A. had purchased on entering the house, and which he had a right to remove during his tenancy, agreed, at B.’s request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, B. agreeing to take them at a valuation, to be made by two brokers. A., at the expiration of his tenancy, delivered up possession of the house to B., leaving the fixtures on the premises. On the following day the fixtures were valued by two brokers at the sum of 40*l.* 10*s.*, and the valuation was signed by them accordingly. A. having brought *indebitatus assumpsit* for the price and value of fixtures, &c., bargained and sold, and for fixtures sold and delivered—it was held that the action was maintainable, and that this was not a sale of an interest in land within the fourth section of the statute of frauds. In *Lord Falkmouth v. Thomas*, 1 Cr. & M. 69, 3 Tyrwh. 26, the bargain for the sale of the crops was made directly between the plaintiff and the defendant.

At all events, there was abundant evidence to go to the jury upon the account stated. When applied to for the 100*l.* after he had been let into

possession of the farm, the defendant repeatedly acknowledged his liability, and promised to pay as soon as he obtained the valuation of his own farm; and that, it appeared he had obtained. Assuming, therefore, that the plaintiff fails to maintain her action on the first count, she is clearly entitled to retain the verdict upon the second count. [*365]

Sir T. Wilde, Serjt., (with whom was Mellor,) in support of the rule. It is no part of the policy of the courts to fritter away the statute of frauds, the object of which was to protect men from having parol contracts set up against them at distant periods, by means of fraud and perjury. Here, the defendant is found in the occupation of a farm, which he has held from Lady-day, 1842; and it is now sought at this remote period, to show, by oral testimony, the terms upon which he was let in. It is impossible to conceive a case coming more directly within the purview of the statute. A surrender and determination of the plaintiff's tenancy, as well as the acceptance of the defendant as tenant, were requisite, before any benefit could arise to the latter from the agreement. What is that but a contract for an interest in or concerning lands? It is not denied that there may be cases where an action will lie on an executed contract, although no action would have lain had the contract remained executory only. But, to apply that rule to the facts of this case, would be to let in all the mischief which the statute of frauds was intended to exclude. In a case of *Waltoff v. Frisby*, tried before PATTESON, J., at the last summer assizes at Leicester, that learned judge rejected parol evidence, under circumstances, as nearly as possible, parallel with those of the present case. Courts of justice have always been astute in giving effect to the provisions of statutes directed to the upholding of a great moral principle; as in the cases under the apothecaries' act, or under the statute 29 Car. 2, c. 7, against Sunday trading: see *Apothecaries' Company v. Roby*, 5 B. & Ald. 949, 1 D. & R. 564; *Smith v. Sparrow*, 4 Bingh. 84, 12 J. B. Moore, 266, 2 C. & P. 544, and other cases. [The court here intimated to the learned serjeant that he need not argue this point any further, as they were all of opinion that the first count did disclose a contract relating to an interest in lands, within the meaning of the statute of frauds.] [*366]

Assuming, then, that the statute precludes the plaintiff from recovering directly upon the contract, the question is, whether she can, by proof of a mere conversation, indirectly obtain the benefit of the contract. It would be inconsistent with every principle of justice, and in a high degree discreditable to the law, to permit such an argument to prevail. [Eale, J. An admission by the defendant that there was such an agreement in writing, would be proof of the agreement: that certainly is letting in all the evil you point out.] To apply that principle here will be nothing less than repealing the statute.(a) In *Lord Falmouth v. Thomas*, 1 Cr. & M. 89, 3 Tyrwh. 26, in *indebitatus assumpsit* upon an account stated, the defendant pleaded, that, before the stating of the account, there was a verbal agreement for the sale of certain crops growing upon the plaintiff's land,

(a) Post, 870 (c).

and for work, labour, and materials done and used in preparing the land for tillage; and that there was a treaty for the plaintiff's letting, and for the defendant's taking, the land for fourteen years, to which the defendant assented, and that the money to be paid for the crops, and the work, labour, and materials, was the money concerning which the account was stated; and that there was no agreement in writing, or any note thereof. To this plea the plaintiff replied, that, before the account was stated, the defendant had mown, &c., the crops and taken them to his own use, and had received the amount of the work and labour and materials. The defendant rejoined, *867] traversing that he had mown, &c., the crops and received *the amount of the work, &c., before the stating of the account. And it was held, upon general demurrer, that the contract, as it appeared on the pleadings, was within the statute of frauds, and that the plaintiff could not recover. There, as here, the contract was executed; (a) and the attempt to sustain the account stated was unsuccessful. The case of *Price v. Leyburn* is not law; and, at all events, it is quite beside this question. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

There were two questions brought before us in this case—one, whether the contract stated in the first count of the declaration was a contract which was required to be proved by a written memorandum signed by the party—the other, whether there was sufficient evidence to maintain the verdict for the plaintiff on the count upon an account stated.

The special count of the declaration was framed upon an agreement between the plaintiff and the defendant, that if the plaintiff, the tenant of a farm, would surrender (b) her tenancy to her landlord on the 25th of March then next, and would prevail on her landlord to accept the defendant as his tenant in the place of the plaintiff, he the defendant would pay the plaintiff 100*l.* as soon as he should become the tenant of the land.

It was not contended that a contract under which the plaintiff, in consideration of a sum of money, gave up her tenancy in the land, and procured the defendant to be put into her place, was not “a sale of an interest in the land” within the meaning of the statute of frauds: but the argument *868] before us was, that, although, *if this contract had been executory, it must have been proved by an agreement or memorandum in writing, yet, as it was *executed*, as the plaintiff had surrendered her tenancy, and had procured the defendant to be made tenant instead of herself, the case was not to be held to be within the statute: and the case of *Price v. Leyburn*, before DALLAS, C. J., was relied upon as an authority to that effect. But, as the special count in this action is framed upon the very contract itself, to enforce the payment by the defendant of the sum stipulated to be paid as the price of the interest in the land which the plaintiff gave up, and to which the defendant succeeded, we think the contract *itself* cannot be considered as altogether *executed*, so long as the defendant's part

(a) In *Lord Falmouth v. Thomas*, the demurrer admitted the truth of the rejoinder, in which the execution of the contract was distinctly denied.

(b) *Vide supra*, 862, n.

still remains to be performed. And the case appears to us to fall within the principle adverted to by LE BLANC, J., in *Griffith v. Young*: and, further, we think the case of *Buttmere v. Hayes* (a) is an authority in point that the present contract, though executed on the part of the plaintiff, yet, not being executed on the part of the defendant also, is still to be considered as a contract within the statute of frauds.

The plaintiff, therefore, failing upon the special contract, the remaining question is, whether she is in a condition to recover the 100*l.* under the count upon an account stated. There was distinct evidence in this case, that, after the plaintiff had given up the possession, and after the defendant had succeeded to it through the plaintiff's application to the landlord, the defendant admitted that he owed the 100*l.* to the plaintiff. And this appears to us to be sufficient evidence to enable the plaintiff to recover on the account stated. (b) The objection was, that the admission of a debt will only enable a plaintiff to recover as upon an account stated, where the debt itself does not appear to be incapable of *being recovered as a debt; and that, here the plaintiff could not recover upon the original contract, inasmuch as it was not evidenced by a writing signed. [*869

But, in the first place, such an exception is contrary to the authority of several decided cases. In *Knowles v. Michel*, 13 East, 249, the ground of the original debt was a sale to the defendant of standing trees, which the defendant afterwards procured to be felled and taken away; and the objection was, that the plaintiff could not recover on the original contract for standing trees, which formed part of the realty: but it was held, nevertheless, that the acknowledgment of the price to be paid for the trees, after they were felled and applied to the use of the defendant, was sufficient to sustain the count on the account stated; Lord ELLENBOROUGH saying, that, if there were an acknowledgment by the defendant, of a debt due to the plaintiff upon any account, it was sufficient to enable him to recover on an account stated. And afterwards, in *Highmore v. Primrose*, 5 M. & Sel. 65, the court held that the proof of the acknowledgment of one item of debt only, was good to support a count upon an account stated; and the former case was there mentioned with approbation, and relied on. In *Pinchon v. Chilcott*, 3 C. & P. 236, there was a verbal contract for turnips growing in a field, upon which it was held the plaintiff could not recover; yet, as the defendant admitted, after some of the turnips were drawn, that he owed the plaintiff 3*l.* for them, it was held, at nisi prius, that he could recover to that amount upon an account stated; and no motion was made to the court to question the ruling. And, in *Seago v. Deane*, 4 Bingh. 459, 1 M. & P. 227, (c) a promise to *pay a specified sum, where the party had had the benefit of the contract, though he could not have been sued upon it, on account of its being a verbal contract only, was held to be [*870

(a) Vide 6 Mann. & Gr. 54.

(b) Vide post, p. 869 (d).

(c) In a *real* account stated, the extinction of cross demands *per confusionem*,—not the bare act of accounting,—appears to form the consideration of the promise to pay the balance.

good evidence on the account stated. See also *Peacock v. Harris*, 10 East, 104. Upon the authority, therefore, of decided cases, we think the plaintiff's right to the verdict on the account stated may be sustained.

And we think it sustainable also on principle; for, after the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay,^(a) and which therefore forms a good consideration for a new promise: and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to prove the original debt before such admission. The principle may not, perhaps, be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming; but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it.

We therefore think the verdict for the plaintiff on the first count should be set aside, and a verdict thereon entered for the defendant; but that the verdict should stand for the plaintiff on the second count.^(b) Rule accordingly.

(a) As to the sufficiency of a consideration arising out of a moral obligation, see *Lee v. Mageridge*, 5 Taunt. 36; *Seago v. Deane*, *supra*, 689; *Littlefield v. Shee*, 2 B. & Ad. 811; *Eastwood v. Kenyon*, 11 A. & E. 438, 3 P. & D. 276, *ante*, 814.

(b) "No action shall be brought upon any contract, or sale, of lands, &c., or any interest of or concerning them, unless," &c. This count was on a promise to pay the price.

*871]

*REGULA GENERALIS.

THE following order, signed by the fifteen judges, was promulgated at chambers, on the 12th of June, 1845:—

"We have considered the means best calculated to prevent parties from fraudulently obtaining judges' orders for signing judgment, and recommend that the following precautions be adopted:—

"That all written consents upon which such orders are obtained, shall be preserved in the chambers of the respective courts.

"That, in actions where the defendant has appeared by attorney, no such order shall be made, unless the consent of the defendant be given by his attorney or agent.

"That, where the defendant has not appeared, or has appeared in person, no such order shall be made, unless the defendant attends the judge and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf: but we think that these precautions are unnecessary where the defendant is a barrister, conveyancer, special pleader, or attorney."

"We think that Sunday ought to be counted as one of the four days between the delivery of paper-books and the day of argument, except it is the last, when it is to be omitted, according to the general rule."

CASES
DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Trinity Vacation,

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

LOGAN v. BELL. July 2.

By a deed of settlement preparatory to the marriage of A. and B., lands were conveyed to C. and his heirs, to the use of B. and her heirs, until the marriage should be solemnized; and, from and immediately after the solemnization thereof, to the use of such person or persons, for such estate or estates, and upon such trusts, &c., as B., notwithstanding coverture, and whether covert or sole, and without consent, &c., should, by any deed or writing under seal, or by her last will, or any writing in the nature of, or purporting to be, her last will, or any codicil thereto, limit, direct, or appoint, &c.; and in default of and until such appointment, to the use of C., during the joint lives of A. & B.; and, after the decease of either of them, to the use of B., her heirs and assigns, for ever.

After the execution of the settlement, and before the marriage, B., by a codicil to a will made by her some months previously, in terms referring to the power contained in the settlement, devised the lands in trust for the children of the marriage, and, in default or failure of children, in trust for A. for life:—

Held, that this was a good execution of the power, though made before the marriage, and notwithstanding that the event upon which it was to take effect, viz., the marriage of A. & B., was contingent.

DEBT, for money received by the defendant to the plaintiff's use, and for money due from the plaintiff to the defendant upon an account stated.

*The defendant pleaded—first, that he was never indebted— [°873
secondly, that the causes of action did not, nor did any of them,
accrue within six years next before the commencement of the suit—
thirdly, payment before action brought.

The cause came on trial before CRESSWELL, J., at the sittings after Trinity term, 1844, when a verdict was found for the plaintiff, subject to the following case:—

This action is brought to recover certain rents of freehold estates received by the defendant from the tenants, and which the plaintiff claims

as his moneys, and which the defendant denies to be his; and the following are the facts on which the plaintiff rests his claim:—

On the 26th of October, 1825, the plaintiff married Isabel Wight; in contemplation of which marriage, on the 22d of October, 1825, a marriage settlement, by lease and release, of the said freehold estates, was duly executed. A copy of the settlement is annexed to, and is agreed to be read as part of, the case.

On the 24th of October, 1825, two days before her marriage with the plaintiff, Isabel Wight made a codicil,—under seal, and duly attested by three witnesses—to a will made by her on the 9th of January, 1824. Copies of the will and codicil are annexed to, and are agreed to be read as part of, the case.

Isabel, the plaintiff's wife, died on the 24th of January, 1837, without issue; since which time the defendant has received the rents and profits of the said estates.(a)

On the 12th of September, 1836, Thomas Gilchrist, a trustee in the said marriage settlement, and the plaintiff's said wife Isabel Logan, and *874] George Logan, granted a lease to Benjamin Bean—a copy of which is also set out in the appendix.

On the 22d of March, 1843, letters of administration to the goods, chattels, and effects of the said Isabel Logan, were granted by the Prerogative Court of Canterbury, to the plaintiff, her husband.

The defendant has paid to the plaintiff the full amount of the rents up to Mrs. Logan's death, including fractional sums beyond the rent due on the days of reservation or payment preceding her death.

After the death of Mrs. Logan, and before the commencement of this action, her heir at law made claim to the property, the rents of which are the subject of this action.

The question for the opinion of the court is, whether the plaintiff is entitled to recover in this action the rents, or any part thereof, received by the defendant; if so, a verdict is to be entered for an amount to be ascertained as before mentioned; and, if the plaintiff is not so entitled, then a nonsuit to be entered.

By the settlement, bearing date the 22d of October, 1825, made between Isabel Wight, spinster, of the first part, George Logan, of the second part, and Thomas Gilchrist, of the third part—reciting that a marriage had been agreed upon, and was intended to be shortly had and solemnized, between the said Isabel Wight and George Logan, and that the said Isabel Wight was seised in fee-simple of the several messuages and hereditaments thereafter particularly described, and, upon the treaty for the said intended marriage, it was agreed (amongst other things) that the said messuage and hereditaments should be conveyed, settled, and assigned in the manner thereafter expressed and declared

(a) It was agreed between the parties that the amount of the receipts, and of all payments to be allowed against such receipts, should, in case the parties differed, be referred to a barrister.

—the premises in question were conveyed to the said Thomas Gilchrist and his heirs, to the use of *the said Isabel Wight and her heirs until the said intended marriage should be had and solemnized ; [*875 and, from and immediately after the solemnization thereof, to the use of such person or persons, for such estate or estates, interest or interests, and to and for such ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such powers, provisos, declarations, and agreements as the said Isabel Wight, notwithstanding her said intended or any future coverture, and whether she shall be covert or sole, and without the consent, concurrence, or privity, of her husband, or with such consent, concurrence, or privity at any time or times, and from time to time, shall, in and by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or in and by her last will and testament, or any writing in the nature of or purporting to be, her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses, limit, direct, or appoint, or give or devise the same : and, for want, and in default of, and until such limitation, direction, or appointment, gift, or devise shall be effectually made, and in case any such shall be made, then, subject thereto, and when and so often as the estates or interests thereby limited or created shall respectively cease and determine, to the use of the said Thomas Gilchrist, his heirs and assigns, for and during the joint natural lives of the said Isabel Wight and George Logan, in trust from time to time to pay the rents, issues, and profits of the said hereditaments and premises (after all taxes, rates, repairs, insurances, charges, and other outgoings payable for and in respect of the said premises, or any of them, shall have been satisfied thereout) unto such person or persons, and in such manner as she the said Isabel Wight, *by note or order in writing under her hand, shall order, direct, [*876 or appoint, notwithstanding her coverture ; and, in default of such order, direction, or appointment, then unto the proper hands of her the said Isabel Wight, to and for her sole and separate use, wholly, and independently of the said George Logan, and without the same being in anywise subject to his debts, control, or engagements ; and the receipt of the said Isabel Wight alone, it was thereby declared, should, notwithstanding her coverture, be a sufficient discharge for so much of the rents and profits of the said premises as shall therein be expressed to be received : and, from and immediately after the decease of either of them the said Isabel Wight and George Logan, to the use of the said Isabel Wight, her heirs and assigns, for ever.

The will of Isabel Wight, referred to in the special case, was as follows :

“ This is the last will and testament of me, Isabel Wight, of, &c., spinster. I give and bequeath all sum and sums of money, shares, estates, and interest which I may have at the time of my decease in any of

the public stocks or funds of Great Britain and Ireland, and the dividend or dividends, interest, and proceeds then due from the same, and all arrears thereof, unto the Rev. Thomas Smith and the Rev. Alexander Cameron, their executors, &c., absolutely, for ever. I give and devise all those my two cottages, messuages, or tenements, &c., situate at Croydon Common, in the county of Surrey, unto the said Thomas Smith and Alexander Cameron, their heirs and assigns, for ever, subject nevertheless to, and charged with the payment of, 50*l.*, which I hereby give and bequeath to Simon Lyster, of Croydon, to be paid twelve calendar months after my decease. I also give and devise all that my messuage or tenement, with yard, &c., situate in the High Street, *Croydon aforesaid, unto William Bell, (the defendant,) his heirs, &c., for ever, (subject as hereinafter mentioned.) I also give, devise, and bequeath all my household goods and furniture, plate, linen, and china, and all other my moneys and securities for money, and all the rest, residue, and remainder of my estate, property, and effects whatsoever, real or personal, unto the said William Bell, his heirs, &c.; but I hereby charge and subject the said messuages and premises, and the said residue of my estate respectively devised and bequeathed to the said William Bell, to and with the payment of my just debts, funeral, and testamentary expenses. And I hereby nominate, constitute, and appoint the said Thomas Smith, and Alexander Cameron, and William Bell, executors of this my will, &c. Dated, January 9th, 1824."

This will was executed in the presence of, and attested by, three witnesses; as was also the codicil referred to in the case, and which was as follows:—

"This is a codicil to my before-written will. I give and bequeath all and singular my messuages, cottages, and hereditaments, situate at Croydon and Croydon Common aforesaid, and all my shares and interest in the new 4 *per centum* annuities, and all other my real and personal estate whatsoever, unto William Birdsell, of Berwick, and John Greenfield, of the same place, and their heirs, &c., upon trust for all the children of my body who shall survive me and attain twenty-one years of age, and their heirs, &c., as tenants in common, in equal shares, and to apply a competent part of the interest, rents, and dividends, for the maintenance, during their minorities, of all my children; and, for default of such children, or failure of them, in trust for my intended husband George Logan and his assigns, for his natural life; and, from and after his decease, in trust for all the children of his body who shall survive him and attain *twenty-one years of age, and their heirs, &c., in equal shares, as tenants in common, and to apply the rents and interest in manner aforesaid for the maintenance and education of them during their minorities: and, for default or failure of such children of his body, in trust to pay, assign, convey, and transfer or dispose of all my real and personal estate in manner as the same is given, bequeathed,

devised, and directed by my before-written will. Witness my hand, this 24th day of October, 1824. And I declare this to be an appointment under the two deeds of settlement of my real and personal estate, on my intended marriage, dated the 22d instant."

Talfourd, Serjt., for the plaintiff.(a) The question is, whether the codicil executed by Isabel Wight, though revoked as a testamentary disposition by her subsequent marriage, does not still enure as a valid execution of the power. It has undoubtedly been held that a will made by a *feme sole* in pursuance of an antenuptial agreement (*not under seal*) by which it was stipulated that she should have a power of disposing of her property by will, is revoked by the subsequent marriage—*Doe d. Hodsdon v. Staple*, 2 T. R. 684; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534. When that case was before the court of King's Bench, Lord KENYON said: "There is no doubt but that the will of a woman, made before coverture, ceases to be her will afterwards; because it is of the essence of a will that it should be valid during the remainder of the devisor's life. Therefore, generally speaking, the will of a *feme sole* ceases to have any operation after she becomes covert. But it is equally clear, that, where an estate is "limited to uses, and a power is given to a *feme covert*, before [*879 marriage, to declare those uses, such limitations of uses may take effect: and this is the rule even in a court of law. Then, as to this case now before us: this will, *quasi* a will, standing unsupported, would certainly have no effect: but it has been agreed that it receives support from the instrument: but it must be remembered that that instrument is no deed; it is not under seal, and a seal is essential to a deed. Therefore it cannot operate as a covenant to stand seised to uses." Here, however, the instrument is executed within the terms of the power; and it is under seal. [MAULE, J. There is no doubt the instrument in question is a codicil. To bring it within the other alternative, you must show it to be a deed: and, to constitute a valid deed, there must be a delivery.] The objection intended to be presented on the part of the defendant, is, that the power could not be exercised by Isabel Wight until *after* her marriage. [CRESSWELL, J. Assuming the codicil to be a good appointment in execution of the power, from what time would it take effect?] Immediately. [CRESSWELL, J. Could it so operate? The trustee is to hold to the use of Isabel Wight and her heirs until the marriage.] In the case of *The Countess of Sutherland v. Northmore*, 1 Dick. 56,(b) where a power was given by a settlement to a married woman, *in case of the death of her husband in her lifetime*, and there should be a failure of issue of the marriage living at her death, to charge the estate with a sum of money, and she executed the power in the lifetime of her husband, and afterwards survived him; it was first determined by the court of King's Bench, and

(a) The case was argued in Trinity term, before Tindal, C. J., and Colman, Maule, and Cresswell, Jts.

(b) S. C. per *nom. Sclater v. Travel*, 3 Vin. Ab. "Authority," (G) pl. 2.

then by the court of Chancery, that the power was well executed. That
 *880] case is *cited by Sir E. Sugden,^(a) as an authority, "that, where
 a power is authorized to be executed in a contingent event, it
 may be executed before the happening of the contingency." The same
 doctrine is laid down in *Dalby v. Pullen*, 2 Bingh. 144, 9 J. B. Moore,
 300. There, a testator devised his estates to trustees, for the use of his
 daughter for life, remainder to the use of her son in fee; but, in case he
 should die without issue, in the lifetime of the daughter, and there should
 be no other issue of her body then living, then to the use of such persons
 as she should by deed or will appoint; and, there being no other issue,
 the mother and son executed an appointment and conveyance to A. in
 fee: and it was held that the power was well executed, notwithstanding
 the execution by the mother was in the lifetime of her son. And this
 principle was recognised in *Doe d. Calkin v. Tomkinson*, 2 M. & Sel. 165.

Channell, Serjt., contra. The power has not been well executed. It
 is not denied, that, taking the instrument as a mere codicil, the marriage
 operated a revocation of it. [MAULE, J. The reason why marriage
 operates as a revocation is, that the party is incapable of continuing her
 will. Here the question is, whether Isabel Wight was not capable, not-
 withstanding her coverture, of continuing her will.] The limitation is,
 to the use of the settlor and her heirs until the intended marriage should
 be had and solemnized; and, from and immediately after the solemniza-
 tion thereof, to the use of such person or persons as she should, notwith-
 standing her intended or any future coverture, and whether she should be
 covert or sole, at any time or times, by any deed or writing under seal,
 or by her will, or any writing in the nature of or purporting to be her
 *881] will, or *any codicil thereto, limit, direct, &c., the same; and,
 in default of, and until, appointment, gift, or devise, to the use
 of the trustee, his heirs and assigns, during the joint lives of the settlor
 and her intended husband; and, from and after the decease of either of
 them, to the use of the settlor, her heirs and assigns, for ever. It is quite
 clear that this gave Isabel Wight no power to appoint, either by deed or
 will, until after the marriage had taken place. There are no uses to sup-
 port this appointment, even if it had been by deed. The power is con-
 ditional, to be exercised only in the event of the marriage taking effect.
 In *Doe d. Hodsdon v. Staple*, 2 T. R. 697, ASHHURST, J., says: "With
 respect to the general question, whether, when a *feme sole* has made a
 will, and afterwards marries, such subsequent marriage does not operate
 as a revocation of the will,—the marriage must have that operation, be-
 cause a will supposes a disposing power at the time in the person making
 it, and that it shall be always subject to his control: but that is not the
 case with a woman after coverture; for, when she enters into that engage-
 ment, she gives up the right to her own property. Then, it has been
 attempted to substantiate the will by connecting it with the marriage

(a) 1 Sugden on Powers, 6th ed. p. 347.

agreement : but I think it cannot be so connected with it as to give it any effect ; for, by the express terms of the agreement, her fortune was to be settled to her and her husband jointly, and the survivor of them, ‘ and, if she survived her husband, then the whole fortune was to be settled to her own use ;’ from whence the defendant’s counsel would infer a power in the marriage agreement to make a will. Even allowing that to be the case, and that, in planning the settlement, estates might have been conveyed to uses, which uses would have been subject to her control by way of appointment, *yet that agreement clearly refers [*882 to an executory act, and not to a will made prior to the marriage. It might have been a great doubt whether it could have been agreed that the marriage should not revoke the will, even if there had been words for that purpose, because it would be a stipulation in direct opposition to a positive rule of law.” Sir E. Sugden (a) cites that case, and *Hodsdon v. Lloyd*, as an authority for the position that, “where, previously to marriage, an agreement is made *generally* that the woman may dispose of her property, she cannot, after the agreement, and *before* the marriage, make a binding will, unless expressly authorized so to do.” *Sclater v. Travell* can hardly apply here: the terms of the power in that case were very peculiar.

Talfourd, Serjt., was heard in reply.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

In this case, the question, as agreed by the parties, is, whether the codicil executed by Mrs. Logan on the 24th of October, 1825, is a valid execution of the power of appointment contained in the marriage-settlement of the 22d of the same month : if it be a valid execution, the plaintiff is entitled to judgment ; if not, the defendant.

The settlement in question—after reciting an intended marriage between Isabel Wight and George Logan, and that Isabel Wight was seised in fee of the land in question—conveys the land to Thomas Gilchrist and his heirs, to the use of Isabel Wight and her heirs, till the solemnization of the marriage, and, from and immediately after the solemnization thereof, to the use of such person or persons, for such estate or estates, *interest or interests, and to and for such ends, [*883 intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such powers, provisoes, declarations, and agreements as the said Isabel Wight, *notwithstanding her said intended, or any future coverture, and whether she shall be covert or sole*, and without the consent, concurrence, or privity of her husband, or with such consent, concurrence, or privity, at any time or times, and from time to time, shall, in and by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or in and by her last will and testament, or any writing in the nature of or purporting to be her last will and testament,

(a) 1 Sugden on Powers, 6th edit., p. 249.

or in any codicil or codicils thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses, limit, direct, or appoint, or give or devise the same; and for want and in default of, *and until, such limitation, direction, or appointment, gift, or devise, shall be effectually made*; and, in case any such shall be made, then subject thereto; and, when and so often as the estates or interest thereby limited or created shall respectively cease and determine, to the use of the said Thomas Gilchrist, his *heirs* and assigns, for and during the joint natural lives of the said Isabel Wight and George Logan—in trust from time to time to pay the rents, issues, and profits, (in the usual form,) to her separate use; and, from and immediately after the decease of either of them the said Isabel Wight and George Logan, to use of the said Isabel Wight, her heirs and assigns, for ever.

On the 26th of October the marriage took place; and, on the 24th, two days before the marriage, and two days after the settlement, Isabel Wight made a codicil, under seal, and signed and published it in the *884] presence of three credible witnesses, by whom it was *duly attested. That codicil is in the following terms:—[His lordship read the codicil.]

Some questions were adverted to in the course of the argument, which may be very shortly disposed of. It is no objection to a power, that the party exercising it has a fee, or other interest in the land. This is clear from many cases; as, *Sir Edward Clere's case*, 6 Co. Rep. 17 b; *Maundrell v. Maundrell*, 10 Ves. 246, and other cases there cited. Nor is there any weight in the objection, that the execution of the power was to operate after an event (the marriage) which was contingent at the time the power was executed: see the cases of *Dalby v. Pullen*, 2 Bingh. 144, 9 J. B. Moore, 300, and *Slater v. Travell*, Viner's Abridgment, title "*Authority*," p. 427, pl. 8, which show that a power may be effectually exercised, though at the time of its exercise it is uncertain whether the event on which alone it could take effect will ever happen. Nor is there any doubt, that, supposing the power in the settlement to extend to a codicil made after the settlement and before the marriage, the appointment by the codicil was not revoked by the marriage, according to the language of Lord KENYON in *Doe d. Hodsdon v. Staple*, 2 T. R. 684, where, after stating, that, generally speaking, "the will of a *feme sole* ceases to have any operation after she becomes covert," he adds, "but it is equally clear, that, where an estate is limited to uses, and a power is given to a *feme covert*, before marriage, to declare those uses, such limitations of uses may take effect; and this is the rule even in a court of law." And the exception in the act of 7 W. 4, & 1 Vict. c. 26, s. 18, which excepts (from the enactment making marriage a revocation) a will made by a woman under a power of appointment, when the estate would *885] not in default of *appointment pass to her heir or next of kin, &c., assumes, that, before the act, a will of a woman under a

power of appointment would not be revoked by her subsequent marriage.

There seems, therefore, to be no doubt that a power to appoint by a codicil made before marriage, may, by proper words, lawfully be conferred, and may, if duly exercised, take effect notwithstanding the subsequent marriage. Nor is there any doubt, that, if Isabel Wight had such a power, it was effectually exercised by the codicil, which expressly refers to the power, and is in all respects strictly within its terms, if it be so with respect to the time of its execution.

The question, therefore, is, whether the power given in the settlement did authorize an appointment before marriage.

The language of the clause conferring the power is full and precise, and it relates to the time when, the circumstances under which, and the form and mode by which, it may be exercised. The words as to time are, "as she the said Isabel Wight shall at any time or times and from time to time." These words in their ordinary sense comprehend all future time, and, therefore, the time between the settlement and the marriage. The words relating to the circumstances under which the power may be executed are—"notwithstanding her said intended or any future coverture, and whether she shall be covert or sole, and without the consent, concurrence, or privity of her husband, or with such consent, concurrence, or privity." These words are all enabling, none of them restrictive: and, as the language respecting time comprehends all future time, that respecting circumstances comprises all the circumstances in which a woman not under a natural incapacity can be placed. There is nothing, therefore, in this part of the clause which restrains the generality of the words relating to time. But, further, the nature of the uses which Isabel Wight is to have the power of limiting, makes it necessary, in order to the full and complete operation of the power as to all that was intended to be within it, that an execution before marriage should be operative. Those uses are by the terms of the settlement to commence "from and immediately after the solemnization of the marriage." She was, by those express terms, if she should think fit, enabled to make an appointment to commence from, and immediately after, the marriage. Now, this could not strictly and completely be performed by an execution after the marriage, which would operate only from the time of its execution (the use between the marriage and the execution of the power being limited to the release to uses); so that any execution after marriage must leave some part, however small, of the uses, to which the power was clearly intended to extend, unacted upon. [886

With regard to the terms of that part of the clause conferring the power which relates to the mode and form in which it is to be exercised, though they are not (if somewhat loosely construed) inconsistent with the construction which would confine the execution to the time which follows the marriage, it will be found that the other construction is more conso-

nant to their full and exact meaning. Those words which give the power to "give and devise by will or codicil," (as distinguished from a power to appoint by a writing in the nature of a will or codicil,) made by Isabel Wight, would be useless, unless for the purpose of a will or codicil made before her first marriage, or after that and before any future marriage, and preventing such will from being revoked by marriage. The words themselves are for that purpose most appropriate, and the purpose is a reasonable and probable one, the effect of these words, (in combination *887] with those which enable her to appoint *during coverture,) being, to prevent any coverture from affecting, in any way, any disposition of the land by will, and saving the necessity of renewing, after coverture, any disposition made while sole, which she might not desire to alter: indeed, to suppose that the word *sole* was introduced for the purpose only of protecting a will made during widowhood, would be to take away its effect in a case to which it naturally applies, which was in the immediate contemplation of the parties, and sure to happen if the marriage took place at all, and to apply it exclusively to a remote event, depending on the double contingency of her surviving her husband and marrying again.

We think, therefore, that the intention of the settlement was, to confer a power to appoint before as well as after the marriage, and that that intention was effectually expressed.

The case of *Hodsdon v. Lloyd*, 2 Bro. C. C. 534, was relied upon for the defendant. In that case, an agreement, not under seal, was made before the marriage, by which it was agreed that the wife's fortune should, "if she happened to die first, be at her own disposal;" and both parties agreed that proper settlement deeds to the effect and purport of the agreement, should be prepared between them. On the same day, after the agreement, and before the marriage, Catharine Culver, the intended wife, made her will, and thereby gave the interest of all her fortune to her husband, for life. The Lord Chancellor held that the will was revoked by the marriage. The distinctions between that case and the present are many and obvious: the agreement was not under seal; there was no person seised to any use; no express mention of any power, or when or how it was to be exercised. In order to support the will as an execution *of a power, it would have been necessary to construe the *388] words "if the said Catharine shall happen to die first, then the aforesaid fortune to be at her own disposal," as conferring an equitable power of appointment by will made before marriage. The Lord Chancellor did not so construe them; but considered that they conferred a power only to make a will after marriage; and there seems no reason to doubt the correctness of that construction; but it is evident that the words so construed in that case, differ so widely from the terms of the settlement in the present case, by which a power defined by express words, is

to time, circumstances, and mode of execution, is conferred, that the construction of the one has no bearing upon that of the other.

On the whole, therefore, we are of opinion that judgment must be given for the plaintiff.

Judgment for the plaintiff.

STEADMAN v. DUHAMEL. July 2.

In an action by an endorsee against the acceptor of a bill, which upon the face of it purported to be a foreign bill:—*Held*, that the defendant was not estopped from showing, that, though dated abroad, the bill was in fact drawn in London; although it was proved that this was done at his express request, and that the plaintiff, who took the bill for value, was not cognisant of the circumstances.

ASSUMPSIT by an endorsee against the acceptor of a bill of exchange for 58*l.* 8*s.*, drawn by one Guichard on the 10th of October, 1843, payable in London three months after date. There was also a count upon an account stated.

Pleas—to the first count, non-acceptance, non-endorsement, and want of consideration—to the second count, non-assumpsit.

At the trial before Lord DENMAN, C. J., at the last ^{*assizes} at Hertford, it appeared that the bill, which was unstamped and written in the French language, though dated at Vichy, a town in France, was in fact drawn in London. [*889

It was thereupon objected, on the part of the defendant, that the bill was an inland bill, and therefore not producible in evidence for want of a stamp; and *Kearney v. King*, 2 B. & Ald. 301, 1 Chitt. Rep. 28, and *Armani v. Castrique*, 13 M. & W. 443, were cited.

It being shown, however, that the bill was drawn in the form in which it appeared, at the express request of the defendant, and that the plaintiff was a holder for value, and without notice that the bill was other than what upon the face of it it purported to be, his lordship overruled the objection, reserving leave to the defendant to move to enter a nonsuit if the court should be of opinion that the defendant was not estopped from raising the point.

A verdict having been found for the plaintiff for the amount of the bill, *Channell*, Serjt., in Easter term last, obtained a rule nisi to enter a nonsuit; against which

Byles, Serjt., in Trinity term, showed cause.^(a) It is conceded that the bill in question, if proved to have been drawn in this country, would require a stamp. But it is submitted that the defendant is estopped, by what appeared at the trial, from availing himself of that ground of defence. Having allowed the bill to go into circulation as a foreign bill, it would be unjust to permit him to set up his own fraud to defeat an

^(a) The judges present at the argument were, Tindal, C. J., and Coltman, Maule, and Crosswell, J.

innocent endorsee, who received it for value, and without notice of the irregularity. *Allegans suam turpitudinem non est audiendus.*(a) In *Jordaine v. Lashbrooke*, 7 T. R. 601, where *evidence was offered *890] on the part of the defendant to show that a bill which purported upon the face of it to have been drawn at Hamburgh, was in fact drawn in London, it was held by Lord KENYON, and by GROSE and LAWRENCE, Js., against the opinion of ASHHURST, J., that such evidence was admissible: but there was no evidence there, as here, to show that the acceptor was cognisant of the facts, or a party to any fraud. The general rule of law is well laid down by Lord DENMAN, C. J., in *Pickard v. Sears*, 6 Ad. & E. 469, 2 Nev. & P. 488: "The rule of law," observes his lordship, "is clear, that, where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Gregg v. Wells*, 10 Ad. & E. 90, 2 Per. & D. 296, the same learned judge, referring to *Pickard v. Sears*, says: "The principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." In *Pitt v. Chappelow*, 8 M. & W. 616, the same principle was acted upon by the court of Exchequer, who held the defendant to be estopped by his acceptance of a bill payable to B.'s order, from saying that B. was incapable of transferring the bill by endorsement. Sir E. Sugden, in his *Law of Vendors and Purchasers*, 10th edit., vol. iii. p. 428, says: "If a person having a right to an estate permit or encourage a purchaser to *891] buy it of another, the purchaser *shall hold it against the person who has the right, although covert, or under age." And in *Taylor v. Croker*, 4 Esp. N. P. C. 187, it was held to be no defence, in an action by the endorsee against the acceptor of a bill of exchange, that the drawers, who had drawn the bill payable to themselves, and endorsed it, were infants when the bill was drawn. [TINDAL, C. J., referred to *Drayton v. Dale*, 2 B. & C. 293, 3 D. & R. 534.] The interest of the revenue requires that this objection should not be allowed to prevail. *Abraham v. Du Bois*, 4 Campb. 269, and *Biré v. Moreau*, 2 Carr. & P. 376, were also cited.

Channell, Serjt., in support of his rule. This is to all intents and purposes an English bill; and the fact of its having been drawn as it was at the request of the defendant, does not preclude him from taking the objection. No consideration of estoppel as between the parties can have any weight where the rights of the revenue intervene. In *Field v. Woods*, 7 Ad. & E. 114, 2 Nev. & P. 117, it was held that a post-dated check,

being unstamped, could not be given in evidence. There, the defendant was clearly setting up his own fraud as a defence to the action, against a *bond fide* holder for value. That case, undoubtedly, was not argued upon the point that is here suggested. [MAULE, J., referred to *Williams v. Jarrett*, 5 B. & Ad. 32, where it was held, that, although, by sect. 12 of the stamp act, 55 G. 3, c. 184, if a bill purporting to be payable at two months from a certain time, be issued before the commencement of that period, without payment of a proportionate duty, the maker is liable to a penalty; yet a bill so post-dated, and bearing the inferior stamp, corresponding with the purport of the bill, *is admissible in evidence, being, on the face of it, conformable to the schedule. [*892]

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

In this case a verdict was found for the plaintiff for 58*l.* 8*s.*, with leave reserved to the defendant to move to enter a nonsuit.

The action was brought upon a bill of exchange drawn by one Guichard, in London, upon the defendant, who was also living in London, and who accepted it there; but it was dated at Vichy, a town in France, and appeared therefore upon the face of it to be a foreign bill of exchange. This date had been put to it at the request of the defendant; and the plaintiff was an endorsee for value, without notice that the bill had been drawn in England; and the only point argued before us has been, whether, the bill being in the hands of an innocent endorsee for value, the defendant was estopped or not from setting up as a defence that it was an inland bill, and therefore not producible in evidence for want of a stamp.

The objection is, strictly and properly, an objection to be made by the court, whenever it appears to them, upon the trial, that an instrument has not been properly stamped; for, the statute 31 G. 3, c. 25, s. 19, enacts that no bill or note liable to the duty in that act shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless stamped; which provision is incorporated in the later acts. The doctrine of *estoppel* of the party is not, therefore, in strictness, applicable to the case. And, as in the case of *Field v. Woods*, 7 Ad. & E. 114, 2 Nev. & P. 117, *it was assumed by the court, that, in an action against the maker of a [*893] banker's check, by a person who became the lawful bearer, it was competent for the defendant to avail himself of the objection that the draft was post-dated, and therefore could not be read in evidence without a stamp, we are unable to see any ground, either upon principle or authority, upon which the defendant is prevented from taking the objection, or the court from giving effect to it.

We therefore think the rule for entering a nonsuit should be made absolute.

Rule absolute.(a)

(a) Vide *Smart v. Nokes*, 6 Mann. & Gr. 911, 7 Scott, N. R. 786.

WRIGHT v. TALLIS and Another. *July 2.*

In case for infringement of copyright of a book entitled, "Evening Devotions, &c., from the German of C. C. Sturm," the defendants pleaded, that Sturm had written religious works in the German language, which had been translated into English, and were much valued; that the plaintiff employed one H. to write the book mentioned in the declaration, and, with intent to defraud and deceive the public, and to make them believe that the book was a translation of an original book written by Sturm, fraudulently published it as and for a translation of an original work written in German by Sturm; and that he published with the book a false and fraudulent preface, the object of which was, to induce the public to believe that the work was really a translation of a work written by Sturm:—*Held*, on general demurrer, that the matters stated in the plea were sufficient to negative the existence of a valid copyright in the plaintiff, and consequently to preclude him from maintaining any action for piracy.

CASE, for infringement of a copyright.

The declaration stated, that, before and at the time of the committing of the grievances by the defendants thereafter next mentioned, there was a subsisting copyright in a certain book entitled, "Evening Devotions; or, The Worship of God in Spirit and in Truth, for every day in the year," from the German of *C. C. Sturm, author of the Morning Devotions;," and that the plaintiff was then the proprietor of such copyright, and had printed and published for sale divers, to wit, 20,000 copies of the said book, to his great profit and advantage: that, after he became and whilst he continued to be the proprietor of the copyright of such book, to wit, on the 1st of May, 1844, divers, to wit, 100,000 copies of the said book had been, in a part of the British dominions, to wit, in England, unlawfully printed without the consent in writing of the plaintiff, so then being the proprietor of the said copyright, contrary to the statute in such case made and provided—of which the defendants, at the time of the committing of the grievance thereafter next mentioned, had notice, and well knew: yet the defendants, well knowing the premises, but contriving, and wrongfully and injuriously intending, to injure the plaintiff, and to deprive him of the profits, emoluments, and advantages which he might, and otherwise would, have derived and acquired from his said book, and also to deprive him of the benefit of his said copyright therein, theretofore, and after the passing of the said statute, to wit, on the 1st of July, 1844, and on divers other days and times between that day and the commencement of the suit, wrongfully and injuriously, and without the consent in writing of the plaintiff, so then being the proprietor of the copyright of and in the said book, first had and obtained, published in a part of the British dominions, to wit, in England, divers, to wit, 50,000 of the said copies of the said book, which had been so unlawfully printed, contrary to the form of the statute in such case made and provided; and thereby the plaintiff had been hindered and prevented from selling divers, to wit, 50,000 copies of his said book, and his copyright therein had been greatly injured and damaged.

Fourth plea—that, before the writing, composing, *and publishing of the said book in the declaration mentioned, one Christopher Christian Sturm, a foreigner, to wit, a German, had written and published in the German language divers books on religious subjects, and had thereby obtained great celebrity as an author, and divers of the said books had been translated into the English language, and had been and were much valued and esteemed by the liege subjects of the queen in this realm; that the plaintiff, well knowing the premises, employed a certain person, to wit, one Robert Huish, to compose and write the book in the declaration mentioned, and the plaintiff also first published the said book; that the plaintiff wrongfully and injuriously intending to defraud and deceive the public, to wit, the liege subjects of the queen, and to cause the said subjects to believe that the said book was the translation of an original book written by the said C. C. Sturm, and to cause the said liege subjects to purchase copies of the said book of and from the plaintiff, and to pay divers large sums of money to the plaintiff for such copies, under the belief that they were purchasing translations of an original work of the said C. C. Sturm, and wrongfully and injuriously intending to obtain great profits by means of the false pretences and deceit thereafter mentioned, before the committing of the said grievances by the defendant, to wit, on the 1st of January, 1843, falsely, fraudulently, and deceitfully caused the said Robert Huish to compose and write the said book in the declaration mentioned for the plaintiff, and then falsely, fraudulently, and deceitfully published the said book to the public, to wit, to the liege subjects of the queen, as and for a translation by the said Robert Huish of an original work written in the German language by the said C. C. Sturm, and then falsely, fraudulently, and deceitfully caused to be printed upon and published with all and every the copies of the said book the following false, fraudulent, *and deceitful title-page of and to such book, that is to say—“Evening Devotions; or, the Worship of God in Spirit and in Truth, for every day in the year; from the German of C. C. Sturm, (meaning the said Christopher Christian Sturm,) author of the Morning Devotions; by Robert Huish, Esq., F. L. A. and H. Soc.”—and also then falsely, fraudulently, and deceitfully caused to be printed upon and published with all and every the said copies of the said book the following false, fraudulent, and deceitful preface of and to such book, that is to say—“The unprecedented patronage which the Morning Devotions, and the Contemplations on the Sufferings of Christ, by Sturm, (meaning the said Christopher Christian Sturm,) have deservedly received from every class of readers, and their consequent incorporation with the standard literature of this country, has operated as a flattering encouragement to the publisher of the above-mentioned works, to present to the public a translation of the Evening Devotions for every day in the year, (meaning the said book in the declaration mentioned,) by the same inspired writer. To descant upon the merits of Sturm (meaning the said Christopher

Christian Sturm) as a pious and moral author, would, with the knowledge which we now possess of his works, be superfluous. It will, therefore, be merely necessary to state, that, in the Evening Devotions, will be found the same tone of holy and pious feeling, the same purity and delicacy of thought, and the same unalterable love of the beauties and excellencies of the Christian religion, by which all his other writings are so eminently distinguished. With the Evening Devotions, the entire works of Sturm, (meaning the said Christopher Christian Sturm,) with the exception of his Sermons, may be said to be incorporated with our national literature; and it may be confidently affirmed that they will tend, in a

*897] great degree, to enhance the *good opinion which the British public have already expressed of his works. It may, however, be necessary to state, in order to obviate any mistake, which might very naturally arise regarding the different works of Sturm, that the Evening Devotions, and the Evening Reflections, are two distinct works; the former being a practical exposition of the duties of Christianity, embracing those subjects which could not be discussed within the Morning Devotions; whilst the latter is confined to the contemplation of the works of God as a guide to the knowledge of Natural History"—and then, and before and at the time of publishing the said book, and before the committing of the said grievances, to wit, on the day and year last aforesaid, falsely, fraudulently and deceitfully stated and represented to the public, to wit, to the said liege subjects of the queen, and to all and every of the said subjects who then purchased copies of the said book, to wit, to 5000 of those subjects, who then purchased the same, that the said book was a translation by the said Robert Huish of an original work written in the German language by the said Christopher Christian Sturm; whereas, in truth and in fact, the said book was not a translation by the said Robert Huish of an original work written in the German language by the said Christopher Christian Sturm, nor was the same a translation of any work of the said Christopher Christian Sturm, nor had nor did the said Christopher Christian Sturm composed or written any such book as in the declaration and in the said false, fraudulent, and deceitful representations and statements mentioned and referred to; and whereas, in truth and in fact, the said book in the declaration mentioned was wholly composed and written in the English language by the said Robert Huish, as the composer and author thereof, and there never was any original work of the said Christo-

*898] pher Christian Sturm, or of any foreign author, *of which it was or could be a translation, as he, the plaintiff, at the time of his causing the said Robert Huish to compose and write the said book, and of his said publishing the same book, and of his causing the said title-page and preface to be printed and published, and of his making the said false, fraudulent and deceitful statements and representations, well knew; and that, by means of the said deceit and the said false pretences and representations, the plaintiff had made divers large and unlawful profits, to

wit, to the amount of 1000*l.*, by the sale of the said book to divers, to wit, 5000 of the said liege subjects, and would thereafter by those means make other large and unlawful profits, by other sales of the said book, to others of the said lieges, if the supposed copyright in the declaration mentioned was and is a subsisting copyright, to the great injury and scandal of her majesty's liege subjects, and to the detriment of true religion, and of the public morals—verification.

To this plea the plaintiff demurred generally: and the defendant joined in demurrer.(a)

Sir T. Wilde, Serjt., (with whom was *Barstow*,) in support of the demurrer.(b) The question is one of great public importance. The nature and character of the work, as described in the declaration and in the plea, are such as to show that the publication of it is highly beneficial. Its object is the advancement of religion and morality; and, though possibly the purchasers may be induced by the representations in the title-page and in the preface, to believe that they are purchasing a translation of a work from the pen of Sturm, originally written in the German language, that is not such a misrepresentation as will have the effect of destroying the plaintiff's property in it. Though some would feel interested in the name of the author, many more would feel interested in the subject-matter of which the work treats. This is not like the case of a publication of an immoral, indecent, blasphemous, or seditious tendency, where the courts have held, that, by reason of the licentious character of the book, the publisher is without the protection of the law—as in *Stockdale v. Onwhyn*, 5 B. & C. 173, 7 D. & R. 625, 2 C. & P. 163; *Poplett v. Onwhyn*, R. & M. 337; *Hime v. Dale*, 11 East, 244, n., 2 Campb. 27, n.; *Fores v. Johnes*, 4 Esp. N. P. C. 97, and *Gale v. Leckie*, 2 Stark. N. P. C. 107. Nor is this at all parallel with those cases in equity, which may be relied on by the defendant, where the court has declined to interfere by injunction, on the supposed ground that there existed no legal interest in the work—as in *Walcot v. Walker*, 7 Vesey, 1. The question is, whether there is any rule of law by which one who publishes a work of literary merit,—of history or science, for instance,—and untruly describes it as a translation, thereby forfeits the protection which the law affords to authors and proprietors of copyrights. Could it be said that the copyright in Walpole's "Castle of Otranto" was destroyed by the false assertion that the work was a translation from the Italian? [TINDAL, C. J. Or that of De Foe's "Robinson Crusoe," because represented to have been the work of the adventurer himself?]

(a) The points marked for argument were as follow:—

For the plaintiff—"that, notwithstanding the matter in the plea alleged, he had a sufficient copyright in the publication in question to enable him to maintain the action."

For the defendant—"that, in consequence of the facts stated in the plea, there was no copyright in the publication in question to entitle the plaintiff to maintain the action."

(b) The case was argued in Trinity term, before Tindal, C. J., and Colman, Maule, and Cresswell, J.

We read in the old books of what are called trade lies, which are said not to vitiate contracts. [TINDAL, C. J. It is a rule of the civil law that *900] *simplex collaudatio non obligat.*] Many works are published anonymously or under fictitious names; but nobody ever dreamt that such a mode of publication would endanger the copyright. In the present case, the value of the work depends upon its own intrinsic merit, and not upon the reputation, however deservedly great, of the supposed author. Its character is unexceptionable; and, for any thing that appears, it possesses as much merit as any that Sturm himself ever published. The objection is quite unprecedented: and it is new to permit a party to come into a court of justice and ground his defence upon an assertion that he himself has been fraudulently palming upon the public, as the production of Sturm, the work of a less distinguished author.

Channell, Serjt., (with whom was M. Smith,) contra. The only question here is whether the plea discloses facts that show the plaintiff to have no subsisting copyright in the work which he charges the defendants with having pirated. The conduct of the defendants is wholly immaterial. It may be conceded that *Stockdale v. Onophyn*, and that class of cases, will not govern the present; but they are important as showing, that, whether the property is claimed with reference to the common law, or to the statutes passed for the protection of copyright, such protection cannot exist where the publication is one that impugns any of the leading principles upon which courts of law proceed. HOLROYD, J., in *Stockdale v. Onophyn*, says: "The ground of action upon which the plaintiff proceeds, is, an alleged injury to his supposed right of publication. But I am at a loss to know how such an injury can be sustained, if the work be such that he has no right to publish it." Here, the plaintiff in his declaration sets up a right of sole and exclusive publication of the work in question. *901] The plea in answer alleges that the plaintiff, wilfully intending to deceive and defraud the public, and to make them believe that the book was a translation of an original work written by Sturm, and to purchase it under the belief that they were purchasing a translation of an original work by Sturm, fraudulently and deceitfully caused Huish to write the book, and falsely, fraudulently, and deceitfully published the same to the public, as and for a translation of an original work written in German by Sturm; and it then goes on to allege that the plaintiff published, together with the book, a fraudulent and deceitful preface, (setting it out,) the object of which was to induce the public to believe that the work was really a translation of a work by Sturm, and falsely and fraudulently representing such to be the case, and that such statements and representations, so made by the plaintiff, were false to his own knowledge. Now, in order to make out this defence, it is not necessary to contend that every misstatement or falsehood as to a publication would avoid the copyright. In the instances put the misstatements were not of a character to mislead or to defraud. Here, however, there once

existed a person of the name of Sturm, whose opinions and whose writings enjoyed a great degree of celebrity amongst a large class of the Christian community. By the title-page and preface affixed to this book those persons are led to believe that it is the work of that esteemed writer, and that, if they purchased it, they would thereby be enabled to possess a complete copy of all his works, with the exception of his sermons. [CRESSWELL, J. You contend, that, if a book be published with a false title-page and a false preface, it will be unprotected from piracy.] Precisely so, assuming always that the misrepresentation and falsehood are not uttered for an innocent or an indifferent purpose. [CRESSWELL, J. That makes the title-page and preface a sort of *warranty.] They [*902 form part of the work. [CRESSWELL, J. Could the plaintiff now acquire a copyright in the book by republishing it with a true title-page and preface?] That may be a matter of doubt. A similar suggestion was made by BAYLEY, J., in *Stockdale v. Omohy*, 7 D. & R. 629. [CRESSWELL, J. The adoption of the suggestion thrown out there would make the work altogether a new one.] The publication of this book in the manner alleged in the plea is a fraud upon the public, and a fraud upon the reputation of the author whose work it is represented to be. Had Sturm been now living, he undoubtedly could have maintained an action for such an unauthorized use of his name: *Archbold v. Sweet*, 1 M. & Rob. 162, 5 C. & P. 217. This is clearly not a case in which a court of equity would interfere by injunction to protect the plaintiff: *Lawrence v. Smith*, Jacob, 471; *Walcot v. Walker*, 7 Vesey, 1; *Southey v. Sherwood*, 2 Meriv. 435. In *Hogg v. Kirby*, 8 Vesey, 215, Lord ELDON intimates a very strong opinion as to the publication of a work under the sanction of another's name. So, in *Pidding v. How*, 8 Simons, 477, where the plaintiff made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture," and in his labels and advertisements made false statements to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured, the Vice-Chancellor refused to restrain the defendant from selling tea under the same name. "The plaintiff," said his honour, "having acquired, either by some communication from Howqua, or in some other manner, the method of compounding a mixed tea which has been so agreeable to the public as to induce them to purchase it, began, some years ago, to sell it under the name of Howqua's Mixture: and the *defendant, find- [*903 ing that the plaintiff's mixture was in considerable demand, has recently begun to sell a mixture of his own, which I take to be different from the plaintiff's, under the same designation. I apprehend, that, *prima facie*, the defendant was not at liberty to do that. There has been, however, such a degree of representation which I take to be false, held out to the public about the mode of procuring and making up the plaintiff's mixture, that, in my opinion, a court of equity ought not to interfere to protect the plaintiff, until he has established his title at law.

As between the plaintiff and the defendant, the course pursued by the defendant has not been a proper one: but it is a clear rule laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth. And, as the plaintiff in this case has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is, that, unless he establish his title at law, the court cannot interfere on his behalf." Wagers that are contrary to public policy, or calculated to produce inconvenience or cause annoyance to others, in however slight a degree, are illegal: *Eltham v. Kingman*, 1 B. & Ald. 683. It is clearly as much opposed to public policy to permit a man, for his own private gain, falsely to represent a book to be the production of another in repute with the public. [TINDAL, C. J. Buller's *Nisi Prius* is said to have been the work of Mr. Justice BATHURST. Could it therefore be said that there was no copyright in it?] That would depend upon the object of the publisher.

Sir *T. Wilde*, in reply. Regard being had to the nature and character of the work now in question, the mere fact of its having been *904] untruly described as a "translation of a German work by Sturm," does not affect the plaintiff's right to the protection of the law. A statement in the title-page of a work no more amounts to a warranty than does the ordinary falsehood that a tradesman utters in recommending his goods. The decision of this case is not at all dependent upon the rule of law as to wages, which rule relates to such wages only as have an impolitic or immoral tendency, or a tendency to injure or wound the feelings of third persons: *Good v. Elliott*, 3 T. R. 693.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

The plaintiff declared in an action upon the case for the infringement of the copyright of a certain book entitled "Evening Devotions, or The Worship of God in Spirit and in Truth, for every day in the year; from the German of C. C. Sturm," of which copyright he alleged himself to be the proprietor. And the defendants, in one of their pleas to this declaration, alleged, that C. C. Sturm had written and published, in the German language, books on religious subjects, which had been translated into the English language, and had been and were much valued by the queen's subjects; and that the plaintiff, well knowing the premises, employed one Robert Huish to compose and write the book mentioned in the declaration, and first published it: and the plea then alleged that the plaintiff, wrongfully intending to defraud and deceive the public, and to make them believe that the book was the translation of an original book written by C. C. Sturm, and purchase copies of it from the plaintiff, and pay large *905] sums of money to the plaintiff for such copies, under "the belief that they were purchasing translations of an original work of the said C. C. Sturm, fraudulently and deceitfully caused the said Robert Huish to compose and write the said book, and falsely, fraudulently, and

deceitfully published the same to the public, as and for a translation of an original work written in German by the said C. C. Sturm. The plea then goes on to state, that the plaintiff published with the book a false, fraudulent, and deceitful preface, which it sets out, the object of which was to induce the public to believe, thoroughly and entirely, that the book was really a translation of a work published by the said C. C. Sturm, and that the plaintiff falsely and fraudulently represented such to be the case to all the subjects of the queen who then purchased the same; and the plea then goes on to allege, that the statements and representations so made by the plaintiff were false, and false to his own knowledge. To this plea there was a general demurrer. And the question raised upon the record is, whether the plaintiff can have a right of action against the defendants for pirating this work; or, in other words, whether he has a valid and subsisting copyright in this work.

The question is one of the first impression, and cannot be said to be free from considerable difficulty. But, upon the best consideration we can give it, and reasoning from principles which appear to have an analogy with the present subject-matter of inquiry, we think that the plaintiff has no ground of action.

The plea alleges that the plaintiff made false representations to the public with respect to the work, for the object and purpose of imposing on the public, and of inducing them to give large prices for the copies which they purchased. And it further alleges that the plaintiff, at the time, (as, it is obvious, from the facts stated, he must have done,) knew such his representations to be false. All these allegations are admitted by the demurrer to be true—the false assertion and representation on the plaintiff's part—his knowledge that such assertion and representation was false—and that the act was done from a base and unworthy motive, namely, that of obtaining money from the public by this false pretence. [*906]

The first observation, therefore, that arises, is, that the present case is perfectly distinguishable from those which have been referred to at the bar, of books of amusement or instruction having been published as translations, whilst they have been, in fact, original works; or having been published under an assumed, instead of a true name. Such was the instance given of "The Castle of Otranto," professing to be translated from the Italian; and such the case of innumerable works published under assumed names—voyages, travels, biography, works of fiction or romance, and even works of science and instruction; for, in all these instances, the misrepresentation is innocent and harmless. There is not found, in any one of those cases, any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation: the purchaser, from any thing that appears to the contrary, would have purchased at the same price, if he had known that the name of the author was an assumed, and not a genuine name; or had known

that the work was original, and not translated. And, indeed, in most of the cases that can be put, the statement is not calculated in its nature to deceive any one, but is seen, upon the very first glance, to be plainly and manifestly fictitious. In those cases, therefore, it was perfectly indifferent to the public, whether the representation was true or not; and, in all probability, the book would have obtained an equal sale, whether it was a translation or an original, whether the name of the author was assumed or genuine.

*907] But, in the case before us, no one of these *observations will apply. The facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing upon the name of an author who (once) had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff is, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise; but to deceive the public, by inducing them to believe that the work is the original work of the author whom he names, when he himself knows it not to be so, to obtain from the purchaser a greater price than he would otherwise obtain. The transaction, therefore, ranges itself under the head of *crimen falsi*. The publisher seeks to obtain money under false pretences: and as, not only the original act of publishing the work, but the sale of copies to each individual purchaser, falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement.

The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry—that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is, to make the practice of it unprofitable to its author.

For these reasons, we think the defendants are entitled to the judgment of the court.

Judgment for the defendants.

*COOK v. HENSON. July 2.

[*908]

To an action by an endorsee against the acceptor of a bill, the latter pleaded, that, before the commencement of the suit, a petition for his protection from process was duly, and according to the statute, presented by him to the court of bankruptcy; that afterwards, and before action brought, a final order for protection and distribution was made in the matter of the petition, by J. E., a commissioner of the said court, duly authorized in that behalf; and that the causes of action in the declaration were contracted before the date of filing the petition:—*Held*, on special demurrer, that this was a sufficient plea in bar, within the 5 & 6 Vict. c. 116, s. 10.

ASSUMPSIT, by the endorsee, against the acceptor, of two bills of exchange, for 9*l.* 18*s.* and 10*l.* respectively.

Plea—that, before the commencement of the suit, to wit, on, &c., a petition for the protection of the defendant from process was *duly, and according to the form of the statute* in such case made, presented by the defendant to her majesty's court of Bankruptcy, and that afterwards, and before the commencement of the suit, to wit, on, &c., *a final order for protection and distribution* was made in the matter of the said petition, by Joshua Evans, Esq., a commissioner of the said court of Bankruptcy duly authorized in that behalf; and that the moneys and causes of action in the declaration mentioned, and every of them, and every part thereof, were contracted before the date of filing the said petition—verification.

Special demurrer, assigning for causes, that the plea did not set forth with sufficient particularity the presenting of the said petition for such protection as therein mentioned, nor how the defendant prayed to be protected, nor did it state, or in any way show, whether the defendant was a trader or not, or, if a trader, whether his debts amounted to less than 300*l.*, or that the defendant had resided within the district of the London court of Bankruptcy twelve months next before the presenting of the petition, or next before the making of the order, or otherwise, or where he ever resided; that the *plea did not allege, or in any way show, that the defendant gave such notice as required by the statute; that the proceedings upon the petition until the giving of the final order, and the said order of the commissioner, should have been stated and set forth with greater minuteness and particularity, and the court thereby have been enabled to judge of its sufficiency; that the plea did not show that the said order was for the protection of the defendant, or for the distribution of his effects; and that the plea was in other respects too general, and insufficient, &c. Joinder in demurrer. [*909]

Douling, Serjt., in support of the demurrer. (a) The first section of the 5 & 6 Vict. c. 116, enacts, "that, if any person, not being a trader within the meaning of the statutes now in force relating to bankrupts, or if any person, being such trader, but owing debts amounting in the whole to less than 300*l.*, shall give notice, according to the schedule to this

(a) The case was argued in Trinity term, before Tindal, C. J., and Coltman, Maule, and Cresswell, J.

act annexed, to one fourth in number and value of his credits, and shall cause the same notice to be inserted twice in the *London Gazette*, and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process to the court of Bankruptcy, if he has resided twelve calendar months in London or within the London district, or to the commissioner of bankruptcy in the country within whose district he may have resided twelve calendar months, which petition shall have annexed to it a full and true schedule of his debts, with the names of his creditors, and the dates of contracting the debts, severally, the nature of the debt, and the security (if any) given for the same, and also the nature and amount of his property, and of the

*910] debts owing to him, with their dates, and the names of his creditors, and the nature of the securities (if any) which he may have for such debts; and which petition shall also set forth any proposal which he may have to make for payment, in whole or in part, of his debts; and it shall thereupon be lawful for the judge or commissioner of the court of bankruptcy to whom, by any order of the court, as hereinafter provided, the same shall be referred, or for the commissioner in the county to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description, which protection shall continue in force, and all process be stayed, until the appearance of the petitioner in court as hereinafter provided; and upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee who shall be nominated by the commissioners acting in the matter of the said petition," &c. And the fourth section enacts "that the commissioner so authorized, or the commissioner in the county, as the case may be, shall, on the day notified by such notice as aforesaid, proceed to examine upon oath the petitioner, and any creditor who may attend such examination, and any witness whom the petitioner or any creditor may call; and the said commissioner may adjourn the examination from time to time, and summon to be examined before him any debtor of such petitioner, or any creditor of such petitioner, or any other person whose evidence may appear necessary for the purposes of the inquiry; and if it shall appear to the said commissioner that the allegations in the petition and the matters in the schedules are true; and that the debts of the petitioner were not contracted by any manner of fraud or breach of trust, or any prosecution against the petitioner, whereby he had been convicted of any offence, or

*911] without having at the time of becoming indebted reasonable assurance of being able to pay the debts, and that such debts were not contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, &c., and that the petitioner has made a full discovery of his estate, effects, debts, and credits, and has not parted with any of his

property since the presenting of his petition, it shall then be lawful for the said commissioner to cause notice to be given, that, on a certain day, to be named therein, he will proceed to make an order, unless cause be shown to the contrary; which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who may attend before the commissioner on such day, or for the carrying into effect such proposal as the petitioner shall have set forth in his petition," &c. In order to make the plea good, it should have shown that the petition contained all that section 1 requires, in order that the court might see that the provisions of the act had been complied with. [TINDAL, C. J. Is it not enough to allege that the petition was presented "duly and according to the form of the statute?"] Clearly not. It may be contended that this general form of plea is warranted by the tenth section, which enacts, "that, if any action or suit is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said action or suit, that *such* petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order, signed by the *commissioner, with proof of his handwriting, [*912 shall be sufficient evidence." The plea, however, does not show that such a petition was presented as is alluded to in that section, that is, a petition containing all the requisites mentioned in the first section. In *Leaf v. Robson*, 13 M. & W. 651, the defendant pleaded, that, in pursuance of the statute 5 & 6 Vict. c. 116, she presented her petition to the Leeds district court of Bankruptcy, in which district she had resided for twelve calendar months previously, praying to be protected from all process against her person and property, and that she might have such further relief as by the said statute was provided, and as the said court should think fit; that such proceedings were thereupon had, that afterwards, to wit, on, &c., an order was made by M. B., the commissioner of bankrupts for the Leeds district, for the protection of the person of the defendant from all process against her person and property, and for the vesting of her estate and effects in C. F., the official assignee named by the said commissioner; whereby, and by force of the premises, and of the said statute, the defendant was then discharged of and from the premises and causes of action in the declaration mentioned, and the said order and discharge still remained in full force: and the court of Exchequer held that this was not a good plea under the tenth section of the act, because it did not strictly follow the words of that section; nor under the fourth section, because it did not show all the requisites of that section to have been complied with.

Channell, Serjt., contra. The plea is good in substance. It follows

the words of the tenth section of the 5 & 6 Vict. c. 116, which, though not so exact as those of the 126th section of the bankrupt act, 6 G. 4, *913] c. 116, or the sixty-first section of the old insolvent debtors' act, *7 G. 4, c. 57, sufficiently shows the intention of the legislature to require only a general form of plea, without setting forth all the special matters referred to in the first and fourth sections. The word "duly" must have the same meaning in the plea as in the tenth section. In *Leaf v. Robson*, the plea did not follow the words of s. 10; neither did it allege that any of the requisites of the earlier sections had been complied with, or that the debt was contracted before the filing of the petition.

Dowling, Serjt., in reply. *Leaf v. Robson* is a distinct authority to show that this general form of plea is not sufficient. The words of the tenth section of the 5 & 6 Vict. c. 116, differ essentially from those of the 6 G. 4, c. 16, s. 126, and 7 G. 4, c. 57, s. 61: the 6 G. 4, c. 16, s. 126, enacts that the party "may plead *in general* that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate;" and the sixty-first section of the 7 G. 4, c. 57, that "it shall be lawful for such person, &c., to plead *generally* that such person was duly discharged according to the act, by the order of adjudication made in that behalf, and that such order remains in force, *without pleading any other matter specially*." Previously to the passing of the bankrupt act of 5 G. 2, c. 30, a special form of plea was required. The words of s. 10, of the act now under consideration, may be satisfied without construing them as affecting any alteration in the course of pleading. [MAULE, J. I strongly incline to think that the act meant to prevent all those matters that are to be discussed and determined before the commissioner, from *914] *being controverted again by each individual creditor.] The same inconvenience now exists in the case of a plea of bankruptcy *puis darrein continuance*. The court of Exchequer, in a case of *Beadle v. Snelling*,(a) came to a similar decision to that in *Leaf v. Robson*.

Curr. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

When the question arising on this record was argued before us, we were informed that the court of Exchequer had recently pronounced judgment on the very point, in a case of *Beadle v. Snelling*. We have made inquiry respecting that case, and find that the same point was raised there as in the present case, but, the court having intimated an opinion that the plea was bad, the defendant's counsel, without arguing the question, asked leave to amend; and, consequently, that case cannot be considered as a *decision* on the point.

(a) Not reported. See *Fisher v. Gibbon*, 2 D. & L. 669.

appears to us that the tenth section of the 5 & 6 Vict. c. 116, does give the right to plead generally in the manner adopted by the defendant in this case. Power is given to the commissioner, in the earlier sections of the act, to inquire into the matters of the petition, and adjudicate upon them, and make a final order for protection and distribution if he thinks fit to do so; and it seems to us that it was the intention of the legislature to make his decision final, and not capable of being controverted in an action; especially as by the twelfth section any creditor or assignee is enabled to petition the commissioner to rescind his final order, so far as relates to the protection of the petitioner's person from process, and so far as relates to the effect of such order in bar of suits and actions. If, then, the decision of the commissioner as to the matters author- [915] izing the making of a final order is not to be controverted, there can be no good reason for requiring the plea to set forth all the facts necessary to give him jurisdiction, and it is reasonable to allow, under the section in question, the same form of plea as is given, in somewhat more express terms, by the bankrupt act, 6 G. 4, c. 16, s. 126. The words there used are, that the bankrupt, having obtained his certificate, "may plead, *in general*, that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate." The section now in question enacts "that it shall be a sufficient plea in bar of the action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, *whereof* the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." And although these two sections are not identical in terms, we think that the plea now under consideration contains all that the latter statute requires in order to constitute a sufficient plea in bar of the suit.

Our judgment, therefore, must be for the defendant.

Judgment for the defendant.(a)

(a) *Vide Toomer v. Gingell*, post, Trinity term, 1846, Vol. III.

*916]

*HAMMOND v. COLLS. July 2.

In trespass for breaking and entering a farm, the plea, after setting out a lease by indenture from A. to the plaintiff, which contained covenants by the plaintiff that he would not, at any time during the term, sow, reap, or take from the arable lands demised, or any part thereof, more than two crops of any sort of corn or grain successively, but would every third year summer-fallow or lay the said arable lands down with rye-grass and clover seeds, or would plant with potatoes, or sow with peas or beans, which should be twice well hoed; and also that the plaintiff, his executors, &c., should not, at any time during the term, let, assign, or set over, or otherwise part with the indenture of lease, or the premises thereby demised, without the special license and consent of A., his heirs and assigns, in writing—with a power of re-entry for breach of any covenant in the lease—and setting out a grant by indenture of the reversion to the defendant, stated, that, after the making of those indentures, &c., the plaintiff did set over and part with the said indenture of lease, and the term thereby created, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained, *to wit*, by *pawning, pledging, and mortgaging the said indenture of lease to and with certain creditors, to wit, B. and C., without the consent of A. or of the defendant.* The plaintiff replied, that he did not set over or part with the said indenture of lease, or the term thereby created, within the true intent and meaning of the said indenture of lease, &c., *by pawning, pledging, or mortgaging the said indenture with the said supposed creditors, modo et forma* :—

Held, bad, on special demurrer; for, that the replication should have denied, generally, that the plaintiff had parted, *i. e.* in any manner parted, with the indenture, instead of confining the issue to the particular mode of parting with it, immaterially stated, under a *scilicet*, in the plea.

Another plea stated, that, during the term, the plaintiff sowed and took off and from fifty acres of the arable lands demised, more than two crops of corn successively; and that he did not nor would every third year summer-fallow or lay the said arable lands or any part thereof down with rye-grass, &c., nor did nor would plant with potatoes, nor sow with peas, which were twice well, or in any manner, hoed, &c. The plaintiff replied—that he *did not*, at any time during the term, sow or take off or from the arable lands, or any part thereof, more than two crops of any sort of grain successively—and in every third year *did* summer-fallow a part, consisting of fifty acres, and *did* lay down with rye-grass and clover seeds part, consisting of fifty other acres, and *did* plant another part, consisting of fifty other acres, with potatoes, and *did* sow another part, consisting of fifty other acres, with peas, and the residue of the arable land with beans, which were twice well hoed, &c.; and that there was not at any time during the said demise, any portion of the said arable lands in the indenture contained which the plaintiff did not every third year either summer-fallow or lay down with rye-grass and clover seeds, or plant with potatoes, or sow with peas or beans which were twice well hoed; contrary to the covenant of the plaintiff in the indenture in that behalf contained, &c.; concluding to the country :—

Held, on special demurrer to the replication, that the covenant set out was twofold—that the tenant *would not* take more than two crops of grain in succession—and that he *would do* certain other things; that the plea correctly averred a breach of the first branch of the covenant, but did not show a breach of the second, inasmuch as it did not negative the sowing with beans; and that the replication, which contained a direct traverse of the breach well alleged in the plea, was not rendered bad by the introduction of the subsequent immaterial matter relating to the other breach.

A replication which answers the only material part of a plea, is good, notwithstanding the introduction of immaterial matter in the plea.

TRESPASS. The first count of the declaration charged the defendant with breaking and entering a messuage, farm, and lands, and treading
 *917] down and *trampling down, &c., the crops thereon growing;
 and seizing, taking, and carrying away the said crops, and converting and disposing of the same to the defendant's use: the second and fourth counts charged an expulsion of the plaintiff and his family from the farm and dwelling-house.

Seventh plea—to the first, second, and fourth counts—that, long before the several times when, &c., to wit, on the 18th of July, 1839, by a certain indenture then made between one James Esdaile of the one part, and the defendant of the other part, the said James Esdaile did demise and lease unto the plaintiff all that messuage, &c., except, &c., to have and to hold the same, except as aforesaid, unto the plaintiff, his executors and administrators, from the feast of St. Michael then next ensuing, for the term of twenty-one years from thence next ensuing, yielding and paying therefore the yearly and other rents in and by the said indenture in that behalf mentioned, and thereby reserved and made payable; and the plaintiff did by the said indenture, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said James Esdaile, his heirs and assigns, amongst other things, in manner following, that is to say, that he, the plaintiff, his *executors [•918 or administrators, should and would at their own proper costs and charges, from time to time, and at all times during the said term of twenty-one years by the said indenture demised, well and sufficiently repair and support, maintain, uphold, and amend the buildings, fences, &c., of the demised premises, the said James Esdaile, his heirs and assigns, assigning and allowing rough timber for doing thereof, reasonable use and wear, and damage by fire, excepted; and moreover that the plaintiff, his executors or administrators, should not nor would at any time during the said term of twenty-one years by the said indenture demised, sow, crop, receive, or take off or from the said arable lands by the said indenture demised, or any part thereof, more than two crops of any sort of corn or grain successively, but should and would every third year summer-fallow or lay the said arable lands down with rye-grass and clover seeds, in a husband-like manner, or should or would plant with potatoes, or sow with peas or beans, which should be twice well hoed; nor should nor would plough, dig, break up, or in any manner convert into tillage, the meadow or pasture lands by the said indenture demised, or any part thereof, at any time during the said term, upon pain of forfeiting and paying to the said James Esdaile, his heirs and assigns, the several and respective additional or increased rents of 10*l.* by the acre in the manner in the said indenture mentioned: and furthermore that the plaintiff, his executors or administrators, should and would in a good and husband-like manner, lay, spread, and bestow upon the lands by the said indenture demised, or some part thereof where the same should be most wanted, all the muck, dung, and compost which should or might arise or be made upon the said premises, or any part thereof, during all the said term of twenty-one years, by the said indenture demised, (except the muck, dung, and *compost to arise and be made in the last year [•919 of the said term, which should be left upon the said premises to and for the use and benefit of the said James Esdaile, his heirs and assigns;) and also should and would bring, and in like manner lay,

spread and bestow upon the said lands, or some part thereof, two loads of good rotten dung, or ten bushels of lime, for and in lieu of every load of hay, straw, or clover which should or might be carried off the said premises at any time during the said term, (wheat and rye straw excepted;) and also that he the plaintiff, his executors or administrators, should not nor would at any time during the said term of twenty-one years by the said indenture demise, let, set, demise, lease, assign, or set over, or otherwise part with the said indenture, or the premises thereby demised, or any part thereof, to any person or persons whatsoever, without the special license and consent of the said James Esdaile, his heirs or assigns, in writing under his, her, or their hand or hands for that purpose first had and obtained; and it was by the said indenture of lease provided, and thereby declared, that the same indenture was made upon the express condition, that, if it should happen that the said yearly rent, or any part thereof, or other rents by the said indenture reserved, in case any should become due, should at any time be behind or unpaid by the space of twenty-eight days next over or after any or either of the days whereon the same ought to be paid, being lawfully demanded, or if the plaintiff, his executors or administrators, should at any time during the said term of twenty-one years, let, set, demise, lease, assign, or set over, or otherwise part with, the said indenture, or the premises thereby demised, or any part thereof, to any person or persons whatsoever, without such license or consent as in the said indenture and thereinbefore for that purpose mentioned, or if the plaintiff, his executors and *administra-
 *920] tors, should not in all things well and truly observe, perform, fulfil, and keep all and every the covenants, clauses, provisoes, articles, and agreements in the said indenture contained on his and their parts to be observed, &c., according to the true intent and meaning of the said indenture, or if the plaintiff should become bankrupt or insolvent—then and in any or either of the said cases, it should and might be lawful to and for the said James Esdaile, his heirs and assigns, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the said premises to have again and from thenceforth hold and enjoy as in his and their first and former estate, and the plaintiff, his executors and administrators, and all other occupiers of the same premises, thereout and from thence utterly to expel, put out, and amove, any thing in the said indenture contained to the contrary thereof in anywise notwithstanding; and it was by the same indenture further provided, &c., (covenant by the lessor, for himself, his heirs and assigns, to assign and allow timber for repairs.) The plea then went on to allege, that the plaintiff became possessed of the premises by virtue of the above demise; that, during the continuance of the term, the interest of James Esdaile came to the defendant by indenture of release made pursuant to the statute 4 & 5 Vict. c. 21; that the defendant thereby became and still was seized in fee of the reversion, and entitled to enter and re-take pos-

session, of the demised premises for any breach of condition; that, after the making of the indenture of lease, and of the release, to wit, on, &c., the plaintiff became insolvent within the meaning of the proviso in the lease in that behalf contained, and the defendant thereupon became and was entitled to re-enter; and that he did, under and by virtue of the power and authority in the lease contained, as assignee of the reversion, peaceably re-enter, and expel the *plaintiff and his family, as he lawfully might, &c.—verification; with profert of the several indentures. [921]

Eighth plea—to the first, second, and fourth counts—that the indenture of lease in the last preceding plea mentioned, was made between the plaintiff and the said James Esdaile, at the time, and in the manner and form, and under the circumstances, severally and respectively in the last preceding plea set forth; by virtue of which demise the plaintiff, at the time and in the manner in the last plea set forth, entered and was possessed of the said demised premises as therein mentioned: that the said indenture of release was thereupon afterwards made between the said James Esdaile and the plaintiff, at the time, and in the manner and form, and under the circumstances, severally and respectively in the last preceding plea in that behalf set forth: that, by virtue of the last-mentioned indenture, the defendant became and was seised and entitled in the manner and under the circumstances in all respects in that plea mentioned, whereof the plaintiff then had notice at the time and in the manner in that plea mentioned: that thereupon afterwards, on a certain day and year after the making of the said several indentures in this plea mentioned and referred to, and during the continuance of the demise by the first-mentioned indenture of lease created, and long before the said several times when, &c., and every of them, to wit, on the 1st of June, 1844,* the plaintiff did set over and part with the said indenture of lease, and the term thereby created, and his the plaintiff's interest therein, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry, therein contained, to wit, by pawning, pledging, and mortgaging the said indenture of lease to and with certain creditors of him the plaintiff, to wit, one R. W. and one F. B., without the special license or consent in writing of the said James Esdaile, or of the *defendant, under their, or either of their hands or hand, or in any other manner, for that purpose first had and obtained, contrary to the covenant of the plaintiff in the said indenture of lease in that behalf contained, and the condition of the same indenture in the said last preceding plea severally and respectively set forth: * * that he the defendant then thereupon became and was entitled to re-enter upon the said demised premises, and every part thereof, by reason of the last-mentioned breach of the said condition of the said demise, and to take advantage of the forfeiture and determination of the said term thereby incurred: that the messuage or tenement, and farm, &c., in the said first-mentioned in- [922]

indenture of lease mentioned, and thereby demised, were and are the close and farm, &c., in the first, second, and fourth counts of the declaration severally and respectively mentioned, and in which, &c., and not other or different: that the plaintiff's possession of the said close and farm, &c., in which, &c., at the said several times when, &c., was such a possession in all respects as in the last preceding plea was in that behalf mentioned and set forth: that, the plaintiff having committed such breach of the said condition as in this plea set forth, he the defendant, under the power and authority in the first-mentioned indenture of lease in that behalf contained, did afterwards, that is to say, at the said several times when, &c., as the assignee of the estate of the said James Esdaile, and of the said reversion immediately expectant upon the determination of the said demise, into and upon the said demised premises, so being the said close and farm, &c., in the first, second, and fourth counts of the declaration respectively mentioned as aforesaid, and every part thereof, in the name of the whole, peaceably re-enter, and the same premises did have again, and from thenceforth hold and enjoy, as in the first and former estate of him the

*923] said James Esdaile, and of him the defendant, and the plaintiff, his family and servants, and all other occupiers of the said demised premises, he the defendant did thereout and from thence utterly expel, put out, and amove, as he lawfully might for the cause aforesaid, and did then thereupon, under and by virtue of the said re-entry, and not otherwise, commit the same several trespasses in the introductory part of this plea, and in the said first, second, and fourth counts of the declaration respectively mentioned and complained of—verification.

To this plea the plaintiff replied—that he did not at any time during the continuance of the said demise, and before the said several times when, &c., set over or part with the said indenture of lease, or the term thereby created, or his the plaintiff's interest therein, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained, *by pawning, pledging, or mortgaging the said indenture of lease* to and with the said supposed creditors of him the plaintiff in that behalf mentioned, or either of them, in manner and form as in the said eighth plea was alleged—concluding to the country.

Special demurrer, assigning for causes, that by the said replication the plaintiff had taken too narrow a traverse upon the defendant's said eighth plea; that the plaintiff ought by his said replication to have denied generally that the plaintiff, in *any* manner whatever, had set over or parted with the said indenture of lease, or the term thereby created, instead of confining the issue to the alleged modes of parting with it, specified under a *videlicet* in the plea, namely, by *pawning, pledging, or mortgaging*—those modes being so laid under a *videlicet*, and being thereby rendered not material, for preventing or precluding the defendant from going into evidence of another or different mode of setting over or parting with the said lease in and by way of violation of the same covenant, as, for in

stance, of a general assignment, and *the plaintiff had no right to limit the defendant to evidence excluding proof of a general assignment, or other mode of parting with the said lease, in violation of the plaintiff's covenant in that behalf, as he sought to do by his said traverse of the said plea, and which would be the effect of an issue joined on the said traverse; that the plaintiff, in thus taking a traverse upon matter which was laid under a *videlicet*, had entirely given the go-by to the substance of the plea, and had violated the ordinary and well-established rules of pleading: that, by such a traverse, the plaintiff sought to raise an immaterial issue; that, by such traverse, the plaintiff sought to entrap the defendant into taking issue on an immaterial point, and one too narrow to admit of a decision of the merits; that such traverse was intended to perplex and embarrass the defendant in his rejoinder, and to avert a trial of any material question; that no safe, certain, material, or single issue could be taken on such replication; and that the traverse taken by the said replication was in other respects too narrow, and illusory and ensnaring. [*924]

The tenth plea was similar to the eighth, down to the asterisk, p. 921: it then proceeded to allege that the plaintiff did not in all things observe, perform, fulfil, and keep the covenants in the said indenture in that behalf contained, on his the plaintiff's part to be observed, performed, fulfilled, and kept, according to the true intent and meaning of the said indenture, that he the plaintiff, his executors or administrators, should not, nor would at any time during the said term of twenty-one years by the said first-mentioned indenture of lease demised, sow, crop, receive, or take off or from the said arable lands by the said indenture demised, or any part thereof, more than two crops of any sort of corn of grain successively, but should and would, every third year, summer-fallow or lay the said arable lands down with rye-grass and clover seeds, in a husband-like manner, or should or *would plant with potatoes, or sow with peas or beans, which should be twice well hoed; but on the contrary thereof, the defendant said that then, and before the said several times when, &c., or any or either of them, he the plaintiff broke the same covenant, and wholly failed to observe, perform, fulfil, and keep the same, in this, to wit, that then, and during the continuance of the said term of twenty-one years by the said indenture of lease granted, he the plaintiff did sow, receive, and take off and from divers, to wit, fifty acres of the arable lands by the said indenture demised, and off and from every part, more than two crops of corn successively, to wit, that the plaintiff then sowed, received, and took off and from the said arable lands, and the said fifty acres parcel thereof, three crops of wheat successively; and that he the plaintiff did not nor would every third year, or at any other time, or in any other manner, summer-fallow or lay the said arable lands, or any part thereof, down with rye-grass and clover-seeds, in a husband-like or in any other manner, nor did nor would plant with potatoes, nor sow with peas, which were [*925]

twice, or at all, well, or in any other manner, hoed, contrary to the covenant of the plaintiff in the said indenture of lease in that behalf contained, and the condition of the same indenture in the said seventh plea respectively set forth. The plea then proceeded as before from the double asterisk, p. 922, to the end.

To this plea the plaintiff replied—that he did during the said term of twenty-one years, and before the said several times when, &c., in all things observe, perform, fulfil, and keep the covenants in the said indenture in that behalf contained, on his the plaintiff's part to be performed, according to the true intent and meaning of the said indenture, particularly in this, to wit, that he did not at any time during the said term of *926] twenty-one years, sow, crop, receive, or take off or from the said *arable lands, or any or either of them, or any part thereof, more than two crops of any kind of corn or grain successively, and did, every third year, summer-fallow a part, consisting of divers, to wit, fifty acres of the said arable lands, and did lay down with rye-grass and clover-seeds, in a husband-like manner, other part, consisting of divers, to wit, fifty other acres of the said arable lands, and did plant another part, consisting of divers, to wit, fifty other acres of the said arable lands, with potatoes, and did sow another part, consisting of divers, to wit, fifty other acres of the said arable lands, with peas, and divers, to wit, the residue of the said arable lands, consisting, to wit, of fifty other acres of the said arable lands, *with beans, which were twice well hoed*; and that there was not at any time during the said demise, and before the said several times when, &c., any part or portion of the said arable lands in the said indenture contained, which the plaintiff did not every third year of the said demise either summer-fallow or lay down with rye-grass and clover-seeds, in a husband-like manner, or plant with potatoes, or sow with *peas or beans* which were twice well hoed; contrary to the covenant of the plaintiff in the said indenture of lease in that behalf contained, and the condition of the same indenture in the seventh plea set forth, in manner and form as in the last plea was alleged—concluding to the country

Special demurrer, assigning for causes, that the traverse taken by the replication was too large; that the replication offered to put in issue and to affirm a matter out of the tenth plea; that the tenth plea did not deny or attempt to dispute or raise any issue upon the sowing of *beans* by the plaintiff in or upon the said demised premises, whereas the plaintiff sought, by his traverse of the plea, to involve that question in the issue, *927] and in this the traverse was too large; that the replication did *not sufficiently avoid the plea, because, although the replication admitted that part of the demised premises were planted with potatoes and sowed with peas, it did not show that such potatoes and peas so planted and sowed, or any part thereof, were or was twice, or in any manner, hoed, as required by the said covenant in that behalf; that in this the replication was repugnant and contradictory, first, by alleging an

absolute performance of the covenant mentioned and referred to in the replication and last plea, and then, by admitting a breach thereof; that the plaintiff, by offering to put in issue such sowing of beans, tendered an immaterial issue; that the replication was double, by containing an allegation of entire observance of the covenants in the indenture of lease in last plea mentioned, and a traverse of the particular breach of the same covenants in the same plea alleged, and also an allegation that the particular breach never happened; that it was impossible for the defendant to take any safe or single issue upon the replication; and that the said replication was intended to perplex and ensnare the defendant in his rejoinder, and was in other respects too wide and general, and was otherwise vicious, informal, and insufficient.

The plaintiff joined in demurrer.(a)

Charnell, Serjt., (with whom was *Petersdorff*.) in support of the demurrers. The eighth plea alleges a breach by the plaintiff of his covenant not to assign, thus—"that the plaintiff did set over and part with the said indenture of lease and the term thereby created, and his, the plaintiff's, interest therein, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained;" and then it goes on, unnecessarily, to state the *mode* [*928 of parting with it—"to wit, by pawning, pledging, and mortgaging the said indenture of lease to and with certain creditors of him the plaintiff, to wit, one R. W. and one F. B.," without the license or consent of the lessor, or of the defendant. The plaintiff in his replication incorporates both of these allegations without any qualification. The circumstance of the defendant's having introduced an immaterial allegation into his plea, does not entitle the plaintiff to introduce a traverse of it in his replication, so as to narrow the breach to the particular mode stated, viz., by pawning, pledging, and mortgaging the indenture and the demised premises, with particular creditors. The general rule of pleading admits of no doubt. Thus, in *Comyns's Digest*, title *Pleader*, (G. 15), it is said: "A traverse larger than can be denied (b) is bad: as, in intrusion, if it be alleged that possessions of the dean and canons of E. founded *apud* Westminster, by dissolution, &c., came to the king, and the defendant intruded, &c., the defendant says that the foundation was by another name, *absque hoc* that it was founded *apud* Westminster by the name alleged; it is a bad traverse, because it extends to the place of the foundation.(c) So, a traverse of the surrender of a copyhold to such a steward such a day, is bad; for, the day and steward ought not to be part of the issue, but the traverse ought to be of the surrender *modo et forma*.(d) So, a traverse that *by indenture* A. bargained and sold, is bad;

(a) The case was argued in Trinity term, before Tindal, C. J., and Coltman, Manle, and Crosswell, Jn.

(b) i. e. involving more matter than ought to be denied.

(c) Citing 1 *Lee*. 39.

(d) *Yelv.* 122, *Cia. Jec.* 202.

for, it makes the indenture part of the issue.(a) In trespass, if the defendant justifies by *molliter manus* to prevent a *rescous* of an execution, in aid and by the command of a bailiff, traverse that it was to prevent a
 *929] *rescous* in aid and by command of the bailiff, *is bad; for, the command is not material.”(b) In *Regil v. Green*, 1 M. & W. 329, in debt for money lent and money paid, the plea first alleged that the sums so lent and paid, were lent for the purpose of paying, and were paid, to J. R., the master of a ship then in a foreign port, for the repairs of such ship, and not on the security or liability of the defendant; and then went on to state an agreement made in such foreign port, between the plaintiff and J. R., for the defendant, for bottomry, and a bottomry-bond given by J. R. to the plaintiff in pursuance of such agreement; by means of which, it was alleged, the plaintiff had desired to obtain exorbitant interest for his advances. The replication to this plea alleged—first, that the money was lent and paid on the security and liability of the defendant—secondly, that there was no such agreement—and, thirdly, that there was no such bond as was stated in the plea. On special demurrer, it was held that the replication was bad, for tendering issues on several matters, having, by the first allegation, put in issue the whole substantial matter of defence. So, again, in *Stubbs v. Lainson*, 1 M. & W. 728, 5 Dowl. P. C. 162, in case for a false return, where the declaration alleged that the defendant *seized, and took in execution*, divers goods and chattels of the value of the moneys directed to be levied as aforesaid, and *then levied* the same thereout; a plea that the defendant did not seize or take in execution any goods or moneys, *and levy* the moneys directed by the said writ to be levied, *modo et formâ*—was held bad, as tendering too large an issue. Lord ABINGER said: “The defendants, by the issue tendered, would render it incumbent upon the plaintiff to prove that the goods were seized, and the money levied out of them; which it is not
 *930] incumbent upon him to do.” *Moore v. Boulcott*, 1 N. C. 323, 1 Scott, 122, 3 Dowl. P. C. 145, is an authority to the same effect. There, to an action on an attorney’s bill, the defendant pleaded, that the bill was for work at law and in equity, and was not delivered to her a month before action; and a replication, that the bill was not for work at law *and* in equity, was held ill, as tendering too large a traverse.

The breach alleged in the tenth plea is, that the plaintiff took from fifty acres of the arable lands by the indenture demised, more than two crops of corn successively, to wit, three crops, *and* that he did not summer-fallow or lay down with rye-grass and clover-seeds, or plant with potatoes, or sow with *peas*, which were twice well hoed. The replication traverses the taking of more than two crops of corn successively, and then goes on to aver that the plaintiff did summer-fallow, and did lay down a certain number of acres with rye-grass and clover-seeds, and did plant a certain other number of acres with potatoes, and sow a certain othe.

(a) Semb. Cart. 218.

(b) Citing 3 Lev. 113.

number of acres with *peas*, and a certain other number of acres with *beans*, which were twice well hoed, and that there was not, at any time during the said demise, any part of the arable lands in the indenture contained, which the plaintiff did not, every third year of the demise, either summer-fallow or lay down with rye-grass and clover-seeds, in a husband-like manner, or plant with potatoes, or sow with *peas* or *beans* which were twice well hoed, contrary to his covenant. The replication thus attempts to put in issue, as well those matters which are defectively or insufficiently stated, as those which are well stated, in the plea. [MAULE, J. There are two covenants, the one negative, the other affirmative: as to the one, the breach is well assigned, and as to the other, not: the replication properly takes issue upon the first, and then adds some idle talk about the other.] The plaintiff had no right *to put in issue the breach [931 defectively assigned, by concluding to the country, as he has done. In *Bishton v. Evans*, 2 Cr., M. & R. 12, 5 Tyrwh. 639, in debt on bond for the penal sum of 12,000*l.*, the declaration set forth the condition, which was for the payment of 6000*l.* with interest, and assigned as a breach the non-payment of 6000*l.*, (omitting interest:) the defendant pleaded that he paid the 6000*l.* with interest, according to the form and effect of the condition; and the plea was held ill on special demurrer. The plea, said PARKE, B., "ought to contain an issue taken upon some averment"—that is, some *material* averment—"in the pleadings on the other side, and such issue ought not to include any other matter. That being the principle upon which the plea ought to have been constructed, what is the present plea? It includes a fact of which no averment is to be found in the declaration. It states that the defendant paid to the plaintiff the sum of 6000*l.*, with interest for the same, &c., without any deduction or abatement for or by reason of any taxes, &c.; thus averring a payment both of principal and interest, a fact to which no corresponding averment is to be found in the declaration. The issue, therefore, is improperly offered, and the plea is bad." So, in *Turnley v. Macgregor*, 6 Mann. & Gr. 46, 6 Scott, N. R. 906, 1 D. & L. 506, a declaration in case stated that one D. had requested the plaintiff to advance him 2500*l.* upon the security of an assignment of the benefit of a claim D. alleged he had against government; that D. had referred the plaintiff, for information on the subject of the said claim, to the defendant, *as being, and as in fact the defendant was, an officer in the service of government, and as being able, from the means of knowledge possessed by him, to afford such information*; that the plaintiff applied to the defendant; and that the latter *falsely and fraudulently represented to [932 the plaintiff that the claim was entertained by government, and sure to be paid, and, as the defendant believed, within three months, &c. The defendant pleaded that he was not an officer in the service of government, nor able, from the means of knowledge possessed by him, to afford information, *modo et forma*, concluding to the country: and it was held

that the first part of the plea was bad, as being a traverse of an immaterial allegation, and the second, because a traverse of matter not alleged in the declaration. The replication in the present case, therefore, is clearly bad; and the only question is, whether the defendant is precluded from taking the objection on special demurrer, by reason of the defectively alleged breach set forth in the plea.

Manning, Serjt., contra. It was incumbent on the defendant in his eighth plea to show how the plaintiff had parted with the indenture set out in the seventh plea; and, having condescended upon the particular mode, he is bound by it. Thus, in *Sir Francis Leke's case*, Dyer, 365 a, in replevin, on the question who ought to keep the enclosure, the avowant stated himself to be *seised in fee*, though he needed not to have set out any particular estate, but might have alleged, generally, that he was seised of the close; yet, having done so, the precise estate was held to be traversable. So, in *Lord Crumwell's case*, Dyer, 365 b, in *ejectione firmæ* upon a demise by C., the defendant pleaded, that, before C. had any thing, B. was seised in fee, and enfeoffed A., who died seised, and his son leased to the defendant, who was possessed till ousted, and the son disseised, by B., who afterwards enfeoffed C., who demised to the plaintiff: the replication, taking by protestation the feoffment to A. and *933] the dying seised, traversed the disseisin: and the replication was held good, though the feoffment or the dying seised might both be traversed, at the election of the plaintiff. These decisions show, that, even though the defendant might have been justified in alleging the breach in more general terms, the plaintiff was at liberty to pursue the course adopted by the defendant, and to traverse in the precise terms used by him. *Robinson v. Turner*, Q. B. Hilary term, 1842, 6 Jurist, 368, is an authority to the same effect. That was an action on an agreement by the defendant to pay an annuity of 25*l.* for fourteen years, with a stipulation that the plaintiff should not willingly or knowingly permit or suffer any one, during that time, to keep post-horses or post-chaises on any part of the premises, for the purpose of letting them to hire. The defendant pleaded that the plaintiff suffered a certain person, to wit, John Thomas, to let divers post-horses and post-chaises, on the premises, in breach of the agreement. At the trial, the defendant gave evidence that the plaintiff had permitted Charles Hatchard to carry on business in breach of the agreement: but it was objected, on behalf of the plaintiff, that John Thomas could not be rejected out of the averment in the plea. The judge directed a verdict for the defendant: and, upon a motion to enter a verdict for the plaintiff, Lord DENMAN said: "We have no doubt, that, if a party, in pleading a breach of an agreement, undertakes to name a person, or an instance of the breach of the agreement, in his pleading, the putting it under a *videlicet* does not make it immaterial; and he cannot give evidence of another person or another instance." [MAULE, J. It does not appear from that report whether or not the plea contained, it

addition to the statement of the particular case of John Thomas, a larger allegation of breach, such as is found here.]

*The tenth plea alleges a breach of covenant by taking three crops of grain in succession from part of the lands demised, and a failure once in three years to summer-fallow, or lay down the arable lands with rye-grass and clover-seeds, or to plant with potatoes, or sow with *peas*; but it does not go on to allege that the plaintiff did not sow with *beans*. The replication gives a complete answer to the first part of the breach, which alone is material: the rest of the plea may be looked upon as surplusage; and so much of the replication as is pleaded thereto may be rejected with it. [934

Channell, Serjt., in reply. The cases of *Sir Francis Lake* and *Lord Crumwell* are altogether beside the present; for, there, one allegation was substituted for another. Neither is this case governed by *Robinson v. Turner*. There, the defendant was setting up a breach of contract on the part of the plaintiff, in order to justify or excuse his own breach of contract. The plea introduced new matter, and therefore must have concluded with a verification: the report is silent as to the form of the replication; and the court will hardly assume that it was merely the similiter. Here, the very object of the demurrer was, to get rid of the difficulty that presented itself in that case. The traverse should have been confined to the first branch of the plea. As to the tenth plea—it must be conceded that the breach is defectively stated, inasmuch as it does not negative the sowing with *beans*. [MAULE, J. There are two distinct covenants. The pleader seems to have treated the second merely as a qualification of the first.] The plea might have been bad on special demurrer on the ground of duplicity; for, though the insertion in a plea of additional matter that is wholly immaterial, does not constitute duplicity, yet, pertinent matter defectively pleaded does amount to duplicity, if it tend to a second ground of defence. The question is, whether a replication putting in issue the second breach so defectively pleaded, is not bad on special demurrer. [MAULE, J. I have always understood the distinction to be this—that matter is said to be defectively stated, where the fault is, not in the thing stated, but only in the manner of stating it.] It is submitted that the rule is not so limited. But, however that may be, the plaintiff had no right to incorporate the immaterial matter in his replication, and so attempt to make it part of the issue. [935

The court suggested that each party should amend, without costs; but this was declined by the defendant. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

This was an action of trespass for breaking and entering a certain farm demised to the plaintiff by James Esdaile, to hold for twenty-one years from Michaelmas 1839, and for cutting and carrying away crops, &c.

The defendant pleaded several pleas, of which the seventh set out the lease granted by Esdaile to the plaintiff, which contained covenants by

the plaintiff that he would not, at any time during the said term of twenty one years, sow, crop, receive, or take off or from the said arable lands demised, or any part thereof, more than two crops of any sort of corn or grain successively, but should and would, every third year, summer-fallow or lay the said arable lands down with rye-grass and clover-seeds, in a husband-like manner, or should or would plant with potatoes, or sow with peas or beans, which should be twice well hoed; and also that he the plaintiff, his executors, &c., should not nor would, at any time during *936] the said term of twenty-one years by *the said indenture demised, let, set, demise, lease, assign, or set over, or otherwise part with that indenture, or the premises thereby demised, or any part thereof, to any person or persons whatsoever, without the special license and consent of the said James Esdaile, his heirs and assigns, in writing—with a power of re-entry for breach of any covenant in the lease. This plea then set out a release of the reversion to the defendant.(a)

The eighth plea, after referring to the lease granted to the plaintiff, and the release of the reversion to the defendant, averred, “that, after the making of those several indentures, and before the said time when, &c., the plaintiff did set over and part with the said indenture of lease, and the term thereby created, and his the plaintiff’s interest therein, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained, to wit, by pawning, pledging, and mortgaging the said indenture of lease to and with certain creditors of the plaintiff, to wit, R. W. and F. B., without the special license or consent in writing of the said James Esdaile or the defendant.”

Lastly, the defendant pleaded, that, during the said term of twenty-one years, the plaintiff did sow, receive, and take off and from divers, to wit, fifty acres of the arable lands demised, and off and from every part thereof, more than two crops of corn successively, to wit, three crops of wheat successively; and that the plaintiff did not nor would every third year, or at any other time, or in any other manner, summer-fallow, or lay the said arable lands, or any part thereof, down with rye-grass, &c., in a husband-like or any other manner, nor did nor would plant with potatoes, nor sow with peas, which were twice, or at all, well or in any other manner hoed, &c.; wherefore the defendant entered, &c.

*937] *The plaintiff replied to the eighth plea, that he did not set over or part with the said indenture of lease, or the term thereby created, or his the plaintiff’s interest therein, within the true intent, &c., “by pawning, pledging, or mortgaging the said indenture of lease to and with the said supposed creditors of him the plaintiff in that behalf mentioned, or either of them, in manner and form as in the eighth plea mentioned.

To the last plea the plaintiff replied, that he did not at any time during

(a) It also stated a re-entry for covenant broken.

the said term of twenty-one years, sow, crop, receive, or take off or from the said arable lands, or any part thereof, more than two crops of any sort of grain successively, and in every third year did summer-fallow a part, consisting of divers, to wit, fifty acres of the said arable lands, and did lay down with rye-grass and clover-seeds, in a husband-like manner, part, consisting of divers, to wit, fifty, other acres of the said arable lands, and did plant another part, consisting of divers, to wit, fifty, other acres, of the said arable lands with potatoes, and did sow another part, consisting of divers, to wit, fifty, other acres of the said arable lands, with peas, and divers, to wit, the residue of the said arable lands, consisting of fifty other acres, with beans, which were twice well hoed, &c.

The defendant demurred to the replication to the eighth plea, on the ground that it ought to have denied generally that the plaintiff had in any manner set over or parted with the indenture of lease, instead of confining the issue to the mode of parting with it alleged under a *videlicet* in the plea.

The defendant demurred also to the replication to the tenth plea, on the ground that the plea did not attempt to raise any issue about the sowing of *beans*, whereas the plaintiff, by the replication, sought to involve that question in the issue; also on the ground that the replication did not show that the *potatoes* and *peas*, said to have been planted and sowed, were twice, or in any manner, hoed.

*After the case had been argued, it stood over that the parties might consider whether they would amend. As neither party has thought fit to do so, (a) we must pronounce our judgment on the record in its present state. And we are of opinion, that, on the demurrer to the replication to the eighth plea, the defendant must succeed. [938]

It is a general rule in pleading, that a traverse more large or more narrow than necessary is bad: Comyns's Digest, title *Pleader*, (G. 15), and (G. 16). As instances of traverses too large, he mentions the case cited at the bar from Yelverton, *suprà*:—"A traverse of a surrender of a copyhold to such a steward, such a day, is bad; for, the day and steward ought not to be part of the issue, but the traverse ought not to be of the surrender *modo et formâ*." And again: "So in trover, if the plaintiff alleges conversion by the sale of the goods, traverse of the conversion by sale is too large." The modern case of *Stubbs v. Lainson* proceeded on the same principle: and several others are cited in Serjt. Stephen's work on Pleading, 5th edit. p. 281, where the rule is very clearly laid down and explained; and in the next page he states and explains the rule on which the argument in support of this replication was founded, viz., that a party may in general traverse a *material* allegation of title or estate to the extent to which it is alleged, though it need not have been alleged

(a) The defendant was satisfied with the intimation that one out of two replications to pleas pleaded in bar of the same counts was bad, the right of action upon those counts failing, unless both replications could be supported.

to that extent. It appears to us, however, that the allegation, under a *scilicet*, that the indenture of lease was parted with by mortgaging it to Watson and Broughton, was not a material allegation of title, and that the plaintiff could not properly put it in issue by his traverse.

*939] *In deciding as to the replication to the tenth plea, it is necessary to see, first, what is the breach there alleged in that plea. The covenant set out is twofold—that the tenant will *not* take more than two crops of grain in succession, and that he *will* do certain other things. The plea then avers, correctly, a breach of the first branch of the covenant, but does not show a breach of the second; for it does not state that the tenant did not sow with *beans*, which was one mode in which he was allowed to perform that branch. The replication contains a direct traverse of the breach well alleged, and matter which would not have been a sufficient answer to a breach of the second branch of the covenant, if that had been shown by the plea. But we are of opinion, that the averments in the plea following the good breach, are mere surplusage: they do not amount to a defective statement of a breach of the second branch of the covenant: that which is stated is sufficiently stated; but that which is necessary to show the second branch of the covenant broken, is not stated at all. The replication, therefore, which answers the only material part of the last plea, is good, notwithstanding the introduction of immaterial matter as an answer to immaterial matter in the plea.

The judgment of the court, then, must be for the defendant, on the demurrer to the replication to the eighth plea, and for the plaintiff, on the demurrer to the replication to the last plea. Judgment accordingly.

*940] *THOMPSON v. HARDINGE, Bart., and Others. July 2.

The freehold of customary tenements within a manor, though such tenements be not held at the will of the lord, and are transferable by lease and release and admittance, is in the lord; and, therefore, where, in trespass by the customary tenant, against the lord, the latter pleads *liberum tenementum*, the derivative and subordinate interest of the tenant ought to be replied.

TRESPASS for breaking and entering a close called Spring Plat. The only plea, which in the result became material, was, *liberum tenementum* in Sir Charles Hardinge, which the plaintiff traversed.

At the trial, before Lord DENMAN, C. J., at the last assizes for the county of Kent, in support of the plea it was proved that Sir C. Hardinge was lord of the manor of Hasden, otherwise East Hasden, in that county; that Spring Plat was a customary tenement within that manor, held at a quit-rent of 1s. 6d. per year, and a relief of 6d. or 8d.; that the customary tenements pass by lease (a) and release and admittance; and that the plaintiff had never been admitted. (b)

(a) To be valid, the custom should have attained maturity in 1189, or about 400 years before the conveyance by lease and release is said to have been invented by Serjt. Moore, to evade the statute of uses, and 350 years before that statute created the occasion for resorting to this circuitous method.

(b) Supposing the freehold to have been in the tenants and not in the lord, the plea would

No evidence was offered on the part of the plaintiff; but it was insisted that the facts proved did not sustain the plea of *liberum tenementum*, inasmuch as they were not inconsistent with the existence of a freehold tenure or interest in the plaintiff.

The jury found the fact that *admittance* was necessary by the custom of the manor; (a) and his lordship was of opinion that the evidence did sustain the plea, and accordingly directed a verdict to be entered for the defendants upon the issue joined thereon, reserving the point for the consideration of the court.

* *Channell*, Serjt., in Easter term, obtained a rule nisi for a new trial, on the ground of misdirection. He submitted, that, assuming [941] admittance to be necessary, still that did not prevent the plaintiff from having such a freehold tenure or interest as would be an answer to the plea: and he cited Cruise's Digest, 4th edit. vol. i. p. 254, title *Copyhold*, C. i. §§ 1—7; Sir W. Blackstone's Treatise on Copyholds; *Lambert v. Stroother*, Willes, 218; *Doe v. Wright*, 10 Ad. & E. 763, 2 P. & D. 672, and *H. Paul v. Lord Dudley*, 15 Ves. 167.

Shee, Serjt., (with whom was *Peacock*,) showed cause. (b) By the custom of the manor, the customary tenements were not held at the will of the lord, but passed by common law conveyance by lease and release, which required to be perfected by admittance in the lord's court; and the plaintiff had never been admitted. The question, therefore, is, whether the allegation in the plea, that the close was the soil and freehold of the lord, was made out. In Burton's Compendium, 6th edit. p. 495, §§ 1282, 1283, it is said: "The words in the *habendum* of the admittance, 'at the will of the lord,' (though they have now entirely lost their original sense,) are characteristic of those customary estates to which ordinary usage, in opposition to etymology, seems to have exclusively appropriated the name of copyholds. There are other customary estates which, in the admittances, are expressed to be held 'according to the custom of the manor,' but without inserting the words 'at the will of the lord.' These, though of the same general nature with copyholds, are commonly designated customary freeholds; but, whatever privileges may be annexed to them, the true freehold interest in [942] the land is always vested in the lord; and, though, in some instances, a deed of bargain and sale is employed, instead of a surrender, for transferring the customary estate, yet, as the assurance is imperfect without an admittance in the lord's court, the tenure is properly said to be by copy of court roll; and by that name only it is excepted in the statute 12 Car. 2, c. 24, s. 7, when other tenures are converted into free and common socage." [MAULE, J. The plaintiff in effect says that this is a *socage* tenure.](c) In *Stephenson v. Hill*, 3 Burr. 1273, Lord Mans-

have been disproved, whether the freehold passed from the preceding tenant of this customary tenement upon the execution of the lease and release, or remained in him until admittance.

(a) See previous note.

(b) In Trinity term, before Coltman, Maule, and Cresswell, Js.

(c) As to the three classes into which socage tenure was formerly divided, see *Old Nature Brevium*, tit. *Garrde*; *Old Tenures*, 125, 126; 3 Mann. & R. 230, n.

FIELD and DENISON, J., said it was "a settled point, that the freehold is in the lord." [CRESSWELL, J. There are cases in which it is much more distinctly put.] In *Doe d. Reay v. Huntington*, 4 East, 288, Lord ELLENBOROUGH said: "The consideration of the second and third species of tenure, i. e. tenure in frankalmoign, and by such services of grand serjeanty as are by that statute saved, may be laid wholly out of the question, as there is no pretence for considering this tenement as being of either of those two descriptions of tenures. It must, therefore, be either holden in free and common socage, or by copy of court roll. If it be of the first description, that is to say, holden in free and common socage, it is clearly devisable, by the direct terms and operation of the statute of wills, 32 H. 8, c. 1. These customary estates, known by the denomination of *tenant-right*, are peculiar to the northern parts of England, in which border-services against Scotland were anciently performed, before the union of England and Scotland under the same sovereign. And, although these appear to have many qualities and incidents which do not properly and ordinarily belong to villenage tenure, either pure or *privileged; (and out of one or other of these species of villenage all copyhold is derived,) *943] and also have some which savour more of military tenure by *escuage uncertain*, which, according to Littleton, § 99, is *knight's service*; and, although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz., the being holden at the will of the lord, and also the usual evidence of title by copy of court roll, and are alienable also contrary to the usual mode by which copyholds are aliened, viz., by deed and admittance thereon, (if, indeed, they could be immemorially aliened at all by the particular species of deed stated in the case, viz., a bargain and sale, which at common law could only have transferred the use;) I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question. In the case of *Stephenson v. Hill*, Lord MANSFIELD and Mr. Justice DENISON considered it to be a settled point, that, in the case of customary estates, 'the freehold was in the lord.' And in the very late case of *Burrell v. Dodd*, 3 B. & P. 378, the court of Common Pleas expressly held these customary tenant-right estates not to be freeholds." So, in *Doe d. Cook v. Danvers*, 7 East, 299, it was held that the freehold of an estate, parcel of a manor, and devisable only by the license of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the accustomed rent *944] suit of court, customs, and other services,— "is in the lord, and not in the tenant, though not holden *o voluntatem domini*. It is quite clear, therefore, that, though the plaintiff in this case may have a freehold

interest, he has no freehold tenure. Sir W. Blackstone, in his *Considerations on Copyholders*,^(a) speaking of customary freeholds, says: "The truth is, that these lands are of such an amphibious nature, that, when compared with mere copyholds, they may with sufficient propriety be called freeholds; and, when compared with absolute freeholds, they may with equal or greater propriety be denominated copyholds." And again (p. 236): "However the lawyers may at times have denominated these tenures a sort of base species of freehold, in contradistinction to mere copyholds, yet the law in the main regards them as being properly copyhold, and not freehold, tenures; else they could not have subsisted to this day: for, they must otherwise have been involved in the general fate of the rest of our ancient tenures, when by the statute of 12 Car. 2, c. 24, they were all abolished, and reduced to free and common socage—except only tenures in frankalmoign, and tenures by copy of court roll. Free and common socage these tenures cannot be; their surrenders and admittances, their frequent fines for alienation, and peculiar paths for descent, (from which two last, as not being the universal properties, no argument hath been hitherto drawn,) their forfeitures, recoveries, and privileges, (still regulated by particular custom in derogation of the common law,) most clearly evince the contrary. Nor will it be pretended that they are of the nature of frankalmoign. There remains, therefore, no other choice; tenures by copy of court roll they must be. This is their indelible character: it is to this they owe their present existence, and survival of other tenures. The statute has reduced all manner of lay freeholds *to one of the same level, of free and common socage: but copyholds remain as they were; as various, as [*945 singular, and as servile in their tenure as ever. These tenures, therefore, not being free and common socage, must necessarily remain copyholds, as entirely as in the time of Bracton: of a superior order, indeed, and distinguished by some advantages (formerly real, now nominal only) over the baser sort; but still far short of the dignity, the immunities, and the independence of that freehold tenure, which for more than three hundred years, has constituted an elector of knights of the shire to serve in the English parliament." [MAULE, J. *Liberum tenementum* does not mean, such a freehold as would entitle the defendant to immediate possession. In *Bingham v. Woodgate*, 1 Russ. & M. 32, Sir JOHN LEACH, M. R., said: "The custom of the manor requiring a bargain and sale, as well as a surrender and admittance, to pass the customary tenements, they are plainly freehold;(b) and *St. Paul v. Lord Dudley* and *Doe v. Danvers* have, therefore, no application. The necessity of surrender and admittance is probably a remnant of the ancient tenure of villenage, and does not affect the freehold nature of the interest, although it prevents the customary tenement from being strictly of freehold tenure—a distinction which is well established."]

(a) Law Tracts, p. 227.

(b) The custom being invalid unless anterior to the statute of uses by at least 347 years, the bargain and sale passed the interest because it was no freehold, but merely a use; to which unexecuted, and then and still unexecutable, use, the lord was seized.

That is precisely the distinction that is now relied on. It is not correct language to call the estate or interest of the customary tenant a freehold. The plaintiff must satisfy the court that the facts proved are a distinct denial of *liberum tenementum* in the defendant. Treating of this plea, Mr. Serjt. 946*] Stephen says: (a) "This plea *may appear at first sight opposed to principle, as giving no colour to the plaintiff. It has been long ago decided, however, that it is not open to this objection; because, though it asserts the *freehold* to be in the defendant, it does not exclude the possibility of the plaintiff's being possessed of the premises for a *term of years* and it leaves him therefore a sufficient colour to maintain the action." (b) And this is not necessarily inconsistent with the dictum in *Doe v. Wright*, which is relied on for the plaintiff. The plea does not exclude the possibility of the plaintiff's being possessed of some subordinate interest, compatible with the defendant's being entitled to the freehold. [CRESSWELL, J. Must you not show that you have such a freehold as would give you a right to the immediate possession?] The defendant is only bound to show that the *freehold* is in him. [MAULE, J. The plea of *liberum tenementum* does not assert a freehold interest only, but a present freehold, a right of immediate possession as against any other freehold.] The plaintiff might have avoided the inference arising from title of the lord, by setting up the freehold interest in himself in his replication. *Lambert v. Stroother*, Willes, 218, is no authority for the position for which it was cited, viz., that, in reply to *liberum tenementum*, the plaintiff can only set up a chattel interest. Lord Chief Justice WILLES by no means so limits the rule.

Channell, Serjt., (with whom was *Bovill*), in support of the rule. There are several descriptions of copyhold tenures. One description is, where the tenant holds by surrender and admittance, *at the will of the lord*: another, where he holds by surrender and admittance, *according to the custom* 947*] *of the manor*. The title of the *present plaintiff is of a third kind.

By the custom of this manor, the customary tenements are held, not by surrender, but by common law conveyance (c) by lease and release, and admittance. The interest of the customary tenant is a freehold. MAULE, J. It seems to me to be matter of fact whether the customary tenements are of free or base tenure. No inquiry seems to have been made about it at the trial: they were called customary freeholds, in the nature of copyhold.] Blackstone, in his Commentaries, speaking of copyhold tenures, says: (d) "The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same kind, be at one and the same time tenant in fee-simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein. The lords, therefore, though they were will-

(a) Steph. Pleading, 3d edit. p. 316; 4th edit. p. 344.

(b) In giving colour, the actual existence of the colourable title is expressed or implied.

(c) Vide *supra*, 940 (a).

(d) Vol. ii. p. 142.

ing to enlarge the interests of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet did not care to manumit them entirely; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and, of course, as the freehold of all lands must necessarily rest and abide somewhere; the law supposes it to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing the usual services, but yet continued to be styled in their admissions tenants at the will of the lord; the law still supposed it an absurdity to allow that such as were thus nominally tenants at will *could have any freehold interest: and therefore continued, and still continues [*948 to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for, though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But, with regard to certain other copyholders, of free or privileged tenure, which are derived from the ancient tenants in villein-socage, and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves, who are sometimes called *customary freeholders*, being allowed to have a freehold *interest*, though not a freehold *tenure*." In *Stephenson v. Hill*, it did not appear whether the lands passed by conveyance or by surrender. Again, in *Burrell v. Dodd*, no mention is made of the mode in which an interest in the tenements passed. In *Doe d. Cook v. Danvers*, the property passed by surrender and admittance. *Doe d. Reay v. Huntington* the most resembles the present case. There, the tenements passed by bargain and sale and admittance. The question arose upon a will; and the court, in substance, decided that the lands were freehold at the time the will was executed. *Hussey v. Grills*, Ambler, 299, and *Willan v. Lancaster*; 3 Russ. 108, show that the surrender is the important thing in these cases, and not the admittance. The effect of the plea of *liberum tenementum* was very much considered in the case of *Doe v. Wright*, 10 Ad. & E. 763, 2 P. & D. 672, where Lord DENMAN, C. J., after time taken for deliberation, said: "In support of the second plea, it was said that there was nothing inconsistent in the allegation of the freehold *being in the defendant, with the recovery of a term for years by the plaintiff; for, [*949 it may be, for example, that both the plaintiff and his lessor are termors under the defendant. In order to estimate the weight of this argument, it is necessary to settle what is the true meaning of *liberum tenementum*, what it admits, and what it denies. Now, as it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would b

bad as amounting to the general issue; it must admit such a possession as would suffice to maintain the action, if unanswered, or as against a wrongdoer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action: in the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant, with a right to immediate possession." Here, if the plaintiff has a freehold tenure or a freehold interest, the defendant cannot have the immediate freehold.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

This was an action of trespass in a close called Spring Plat; to which the defendants pleaded various pleas on which no question arises. They also pleaded a plea of *liberum tenementum* in Sir Charles Hardinge, on which issue was joined, and which gave rise to the present question.

It appeared in evidence that Spring Plat was a customary tenement of the manor of which Sir Charles Hardinge was the lord; and it was proved, by the steward of the manor, that the customary tenements of the manor pass by lease and release and admittance. No further proof was given from which any conclusion could be drawn whether the freehold, of the customary

950*] tenements *held of the manor, was in the lord or in the tenant. But the counsel for the plaintiff contended that the evidence did not show satisfactorily that admission was necessary; and addressed the jury on that point, urging that, if admission was not necessary, there could be no ground for holding the freehold to be in the lord. It appears by the learned judge's report that the case was left to the jury, who found, on the plea of *liberum tenementum*, for the defendants. A motion was afterwards made, on the ground that the customary estates of this manor passing by lease and release and admittance, the freehold must necessarily be in the tenant; or, if there was a freehold in the lord, there was a freehold interest in the tenant, which need not be specially replied to the plea of *liberum tenementum*.

The case was argued before my brothers MAULE, CRESSWELL, and myself; and we are of opinion, that, if the freehold is in the lord, the tenant's interest must be of a subordinate nature, and must be replied, on the same principle on which a term of years must be pleaded in answer to the plea of *liberum tenementum*.

It appears from the cases of *Doe d. Reay v. Huntington*, and *Doe d. Cook v. Danvers*, that the freehold, in the case of customary estates of this nature, is in general in the lord: and it does not appear to us that the nature of the tenures in this manor was so far gone into on the present occasion as to show that the verdict was wrong. As, however, this verdict would bind the right, (a) we think the plaintiff ought to be at liberty to try the case over again, if he thinks he can make out that the freehold is in him, and that it is worth his while to attempt it: but, as we do not see that there

(a) The plaintiff would be estopped from denying the lord's immediate seisin of the freehold, not from showing a derivative possessory title consistent with that seisin.

*has been any miscarriage in the judge, it must be on the terms [*951 of his paying the costs.

Rule absolute for a new trial, upon payment of costs.(a)

(a) As to the different species of base tenures falling under the somewhat inaccurate designation of customary freeholds, see 3 Mann. & Ryl. 332, 338; Mann. Exch. Pract. 2d edit. 42 350, 368, n., 359, 360, 363, 364, 387.

RAWLINGS v. BELL and Wife. July 2.

In case against husband and wife for falsely representing to the plaintiff, a broker employed by them to distrain upon certain premises in which the wife had an interest, that the latter was entitled to distrain for rent in arrear, whereby the plaintiff, who made the distress, was put to costs in a replevin suit—it appeared that a distress-warrant was signed by the wife and handed to the plaintiff in the presence of the husband; that no representation whatever was made by the defendants, or either of them, at the time the warrant was so handed over; but that, in fact, the wife had no right to sign a warrant, the legal estate in the premises being in the trustees under her marriage-settlement:—*Held*, that it was properly left to the jury to say whether there was any false or fraudulent representation in the mere omission to state that the property was in settlement when the plaintiff was employed to distrain; and, the jury having found there was not, that the plaintiff was not entitled to recover on not guilty, it being essential to the maintenance of the action that the falsehood of the representation should have been known to the party making it.

THIS was an action upon the case. The declaration stated that the defendants, theretofore, to wit, on the 25th of October, 1842, did represent and affirm to the plaintiff that the defendant Jane was lawfully and of right entitled to seize and distrain the goods and chattels then being in and upon a certain messuage, &c., situate, &c., for a certain sum of money, to wit, 39*l.* 7*s.* 6*d.*, which the defendants then represented and affirmed to the plaintiff was due from James Augustus Lamb to the defendant Jane, for the rent of the said messuage, &c., and the defendants then requested the plaintiff to seize and distrain the goods and chattels then being in and upon the said messuage, &c., as bailiff of the defendant *Jane, for the said [*952 pretended arrears, and then retained and employed him as such bailiff; and that the plaintiff, confiding in the said representation and affirmation of the defendants, and believing the same to be true, and not knowing to the contrary, did afterwards, to wit, on, &c., aforesaid, as bailiff of the defendant Jane, under and by virtue of the said retainer and employment, seize and take as a distress for the said pretended arrears of rent, certain goods and chattels of one Philip F. Dover, of great value, to wit, of the value of 150*l.*, there found an' being in and upon the said messuage, &c., and the plaintiff, relying on the said representation and affirmation, and believing the same to be true, and not knowing to the contrary, as such bailiff, and under and by virtue of the said retainer and employment, then impounded the said goods and chattels so distrained as aforesaid, and kept and detained the same so impounded from thence until, &c., when the sheriff, on the complaint of Dover, and on his giving bond, caused the goods to be replevied and delivered to Dover, who levied his plaint in the county

court against the now plaintiff, which was removed into the court of Common Pleas, until, to wit, on the 24th of April, 1844, when Dover, by the consideration and judgment of this court, recovered against the now plaintiff, in an action of replevin, 62*l.* 9*s.*, &c.; that the plaintiff, relying upon the representation and affirmation of the defendants, &c., with the authority and at the request of the defendants, theretofore, to wit, on, &c., duly appeared to and defended the said action; whereas, in truth and in fact, the defendants deceived the plaintiff in this, to wit, that the defendant Jane was not, at the time of making the said representation and affirmation, or at the time of the seizing and taking of the said distress, entitled to seize and distrain any goods or chattels in or upon the said messuage, for the said sum *953] of *money, or any part thereof, nor had she any right, title, or authority to distrain upon the said messuage, &c., or any part thereof, or to authorize or direct the said distress: by means of which said several premises the plaintiff was forced and obliged to, and did, to wit, on the 8th of January, 1845, pay to the said P. E. Dover a large sum of money, to wit, the sum of 66*l.*, for the damages recovered in the said action of replevin, and interest thereon, and for the costs and expenses of issuing certain writs of execution against the goods of the plaintiff; and the plaintiff was also, by means of the premises, put to great inconvenience, and sustained great loss, and was unable for a long time to attend to his necessary affairs and business, Dover having issued a writ of *ca. sa.* against him upon the said judgment, and threatened and endeavoured to arrest and imprison him thereon, &c.

Pleas—first, not guilty—secondly, that the defendants did not, nor did either of them, request the plaintiff to seize or distrain the goods and chattels then being on the said messuage, &c., as bailiff of the defendant Jane, nor did they or either of them retain or employ him as such bailiff, *modo et formâ*—thirdly, that the plaintiff did not seize or take as a distress the said goods and chattels in the declaration in that behalf mentioned, *modo et formâ*.

The cause was tried before ALDERSON, B., at the last spring assizes for Surrey. The facts that appeared in evidence were as follow:—The plaintiff, a broker, was, on the 25th of October, 1842, employed to distrain for arrears of rent alleged to be due to the defendant Jane Bell in respect of the Rose and Crown public house, Clare Court, Clare Market. The distress-warrant was filled up by the plaintiff, and signed by Mrs. Bell and handed *954] back to the plaintiff in the presence of *her husband, and the latter personally interfered in the distress. The distress having been made, the tenant replevied; and the present plaintiff, at the request of Mr. Bell, and by Bell's attorney, (who stated that he looked only to Bell for his costs,) defended that suit, and had a verdict against him, and was ultimately compelled to pay the costs, amounting to 66*l.* It was admitted that the legal estate in the premises on which the distress was made, was in the trustees under Mrs. Bell's marriage-settlement, and that this fact was not communicated to the broker at the time the warrant to distrain was given to him.

The learned judge left it to the jury to say whether there was any false or fraudulent representation in the mere omission to state that the property was in settlement when the plaintiff was employed to distrain. The jury thought there was not: whereupon the judge (a) directed a verdict to be entered for the defendants on the first issue, and for the plaintiff on the second and third issues—it being agreed, that, if the court should think the mere omission to state that the property was in settlement when signing the warrant, constituted a false representation, and that falsehood without fraud was sufficient to entitle the plaintiff to a verdict of not guilty, the verdict should be entered for him upon that issue also, damages 66*l*.

Channell, Serjt., in Easter term, obtained a rule nisi accordingly. He cited *Humphrys v. Pratt*, 5 Bligh. N. S. 154, 2 Dow. & Clark, 288; *Evans v. Collins*, 5 Q. B. 804; *Collins v. Evans*, 5 Q. B. 820; *Adamson v. Jarvis*, 4 Bingh. 66, 12 J. B. Moore, 241; *Gresham v. Postan*, 2 C. & P. 540; *Williamson v. Allison*, 2 East, 446; **Brown v. Edgington*, 2 Mann. [955 & Gr. 279, 2 Scott, N. R. 496; *Betts v. Gibbins*, 2 Aq. & E. 57, 4 Nev. & M. 64; and *Toplis v. Grane*, 5 New Cases, 636, 7 Scott, 621.

Talfourd, Serjt., showed cause. (b) There was no evidence of any false representation made by Mr. Bell: and the action is not brought for any supposed false representation by the wife alone. If the husband participated at all, the wife is improperly joined. In *Weall v. King*, 12 East, 452, upon a declaration in case alleging a deceit to have been practised upon the plaintiff by means of a warranty made by two defendants, upon a *joint* sale to him by both of sheep, their joint property, it was held that the plaintiff could not recover upon proof of a contract of sale and warranty by one only as of his separate property—the action, though laid in *tort*, being founded on the *joint contract* alleged. Lord ELLENBOROUGH said: “The declaration alleges the deceit to have been effected *by means of a warranty* made by *both the defendants* in the course of a *joint sale* by them both of sheep, their *joint property*. The joint property thus described is the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity: and it is a rule of law that the proof of the contract must correspond with the description of it in all material respects: and it cannot be questioned that the allegation of a joint contract of sale was not only material, but essentially necessary to a joint warranty alleged upon record to have been made by the supposed sellers, by whatever circumstances, and in whatever action, be the same debt, assumpsit, or *tort*, the allegation of a contract becomes necessary to be **made*; and such allegation, or [956 any part of it, cannot (as here it certainly cannot) be rejected as mere surplusage: such allegation requires proof strictly corresponding therewith: it is in its nature entire and indivisible, and must be proved as laid in all material respects.” [MAULE, J. There, the contract was the

(a) Who reported that he agreed with the jury.

(b) The case was argued in Trinity term, before Tindal, C. J., and Coltman, Maule, and Gresswell, Ja.

foundation of the action.] This is, in substance, an action upon a promise to indemnify; as in *Adamson v. Jarvis*, *Toplis v. Crane*, and *Bells v. Gibbins*. The proof given at the trial clearly was not sufficient to sustain the action: the plaintiff should have shown that Mrs. Bell made a representation that was false to her own knowledge, as in *Humphrys v. Pratt*. The wife had no power to retain the plaintiff to make the distress; and there was no evidence that he was retained by the husband. [MAULE, J. The husband was present when the warrant was signed and handed over to the broker. He clearly was a party to whatever representation was made.]

Channell, Serjt., (with whom was *Petersdorff*,) in support of the rule. There can be no doubt that husband and wife may be sued jointly for a tort committed by both: *Keyworth v. Hill*, 3 B. & Ald. 685; *Vine v. Sanders*, 4 New Cases, 96, 5 Scott, 359. *Humphrys v. Pratt* is expressly in point. There the sheriff having, upon the representation of the plaintiff in a suit, seized goods under a *f. fa.* as belonging to the defendant, and damages having been recovered against the sheriff by a third person claiming the goods—it was held that an action upon the case lay at the suit of the sheriff for the false representation: and a declaration stating such a case, without any averment of fraud in the representation, or knowledge of its falsehood, was held good upon motion in arrest of judgment. In

*957] *Evans v. Collins*, a sheriff declared in case, for that the defendants, being attorneys of P., who had sued out a *ca. sa.* against J. W., and the sheriff having in custody (under another *ca. sa.*) another J. W., who was entitled to his discharge, the defendants, well knowing the premises, falsely represented to the sheriff that the last-mentioned J. W. was the J. W. against whom P.'s writ had issued; by means whereof the defendants caused the sheriff to detain the J. W. who was in his custody, for which the last-mentioned J. W. sued the sheriff, and he paid money by way of compromise. The defendants pleading not guilty, evidence was given, for the sheriff, that his officer delivered a note to the defendants' managing clerk in P.'s action, describing the J. W. who was in custody, and inquired if that was the J. W. whom they had sued on behalf of P.; and that the clerk took the letter into the office where the defendants were, and afterwards returned and told the officer that that was the J. W.; neither the defendants nor the clerk at that time knowing the contrary. It was held by the court of Queen's Bench, that, on this evidence, the jury were warranted in finding for the sheriff; an action being maintainable for the misrepresentation, and the defendants being liable, under the circumstances, for the misstatement of their clerk. Lord DENMAN there said: "Upon consideration, we hold that the principle of *Humphrys v. Pratt* must be applied to the present case. One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame: but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which

he did not know to be true: and it is just that he, not the party whom he has misled, should abide the consequences of his misconduct. The allegation that the defendant knew his representation to be false is therefore immaterial: without it, the declaration discloses enough to maintain the action; and nothing that goes beyond that necessity need be proved." The observations of BEST, C. J., in *Adamson v. Jarvis*, are also to the purpose and most material. "Every man," he says, "who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have." And that case is mentioned with approbation in *Betts v. Gibbins*. In *Toplis v. Grane*, TINDAL, C. J., in delivering the opinion of the court, takes a distinction between matters of which the broker has the means of informing himself, and those of which he cannot be supposed to have any means of obtaining a knowledge. If there be any objection to the right of the plaintiff to recover in this case, it could only be by motion to arrest the judgment. [CRESSWELL, J. I do not see how the plaintiff can be entitled to a verdict on the second issue, seeing that the wife could not retain the plaintiff to make the distress.] *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

In this case the plaintiff declared against the defendants in an action upon the case for a *tort*, stating in the declaration, that the two defendants had represented and affirmed to the plaintiff that the defendant Jane was lawfully and of right entitled to seize and distrain the goods and chattels then being upon certain premises, for certain rent which the defendants falsely represented and affirmed to the plaintiff to be due to the defendant Jane; and that they retained and employed the plaintiff as bailiff to distrain for the rent: and the declaration then stated that a verdict and judgment had been obtained against the plaintiff who had been made a defendant in a replevin suit, the amount whereof he had been obliged to pay; and then negatived the truth of the affirmations and representations of the defendants. [*959]

The plea of not guilty was pleaded amongst other pleas; and, at the trial of the cause, before my brother ALDERSON, the evidence was, that Rawlings got a blank warrant, and filled it up, and Mrs. Bell signed it and gave it to him, and that she made no representation of her right to distrain, other than is to be implied from signing the warrant. It was admitted also that the legal estate of the premises was in the trustees of Mrs. Bell's marriage settlement.

Upon this state of facts, the learned judge directed the jury not to find for the plaintiff on that issue, unless they were satisfied that the mere omission to state that the property was in settlement, when the plaintiff was employed to distrain, was a false and fraudulent representation; at the same time giving the plaintiff leave to move to enter a verdict for the plaintiff for 66*l.*, if the court should be of opinion that the mere omission to name the

trustees, when signing the warrant, made it a false representation, and that falsehood, without fraud, was sufficient to support the verdict.

On the part of the plaintiff it was contended, that the falsehood of the statement was sufficient to support the action, although it was made without any intention to mislead, and without any knowledge of its falsehood. But it seems to us that a statement false in fact, but not false to the knowledge of the party making it—as in **Polhill v. Walter*, 3 B. & Ad. 114—
 *960] nor made with any intention to deceive, will not support an action, unless from the nature of the dealing between the parties a contract to indemnify can be implied. In this case, the right to maintain the action rests upon the alleged assertion by the wife that she had a right to distrain. But there could be no retainer of the plaintiff to distrain given by the wife, nor any contract *by her* to indemnify him. Her representation, therefore, being made honestly, and without knowledge of its falsehood,^(a) was not sufficient to give a right of action.

The plaintiff has endeavoured to get out of the difficulty that existed as to his maintaining an action on the implied contract to indemnify, by declaring in *tort*: but, in the absence of any such contract, we think it was essential to the maintenance of the action in its present form, that the falsehood of the representation should have been known to the party making it.

We think, therefore, the direction of the learned judge was right, and the verdict also right; and that the rule for entering a verdict for the plaintiff must be discharged.

Rule discharged.

(a) She knew the facts which made the representation false.

*961]

*DAWSON v. CROPP. July 2.

Trover lies against a landlord who makes a second distress for the same rent, when he might have taken sufficient at first, or where, having taken a sufficient distress at first, he voluntarily abandons it.

In trover for household furniture, the defendant pleaded that he took the goods as a distress for rent. Replication, that, after the rent became due, and before the distress in the plea mentioned, the defendant took goods of the plaintiff other than those in the count mentioned, as a distress for the arrears of rent, the said goods being liable to a distress for the said rent, and of sufficient value to satisfy it, and that the defendant could and might have satisfied the arrears, &c., thereout, yet that he wrongfully and vexatiously, and without excuse, refused and neglected so to do, &c.

Held, on general demurrer, a good answer to the plea; for, assuming the rent to remain due, still the landlord could not under the circumstances lawfully make a second distress.

Rejoinder—that the goods first seized were not of sufficient value to satisfy the arrears of rent, and that the defendant, before the making of the second distress, lawfully abandoned and put an end to the first, and withdrew from possession, and that the rent so distrained for remained wholly due and unsatisfied. Surrejoinder—that the goods and chattels in the replication mentioned were of sufficient value to satisfy the arrears of rent:—

Held, on special demurrer, that, if the rejoinder could be read so as to make the insufficiency of the goods distrained the ground for abandoning the distress, the averment of insufficiency was material, and the surrejoinder traversing it, good; but that, if it could not be so read, the rejoinder was bad, by reason of its not showing any lawful ground for relinquishing the first distress, and taking a second, so as to answer the matters alleged in the replication.

To a count in trover for household furniture, goods, and chattels, the defendant, amongst other pleas, pleaded as follows:—

That, before and at the time of the committing of the said grievance in that count mentioned, and during all the time during which the rent distrained for as thereafter mentioned was accruing due, to wit, on the 24th of June, 1844, and for a long time before, to wit, for half a year before that day, the plaintiff held and enjoyed a certain messuage, with the appurtenances, as tenant thereof to the defendant, under and by virtue of a certain demise thereof before then made to the plaintiff, at and under the yearly rent of 56*l.*, payable by the plaintiff for the same quarterly, on the 25th of March, *&c., in each and every year during the continuance of the said demise, by even and equal portions, the reversion of [962 and in the said messuage during all the time aforesaid, and still, belonging to the defendant; that, during the said demise and tenancy and before the time of the committing of the said grievance in that count mentioned, to wit, on the 24th of June, 1844, a large sum of money, to wit, 28*l.*, of the rent aforesaid, for the space of half a year ending on the day and year last aforesaid, became and was due and payable from the plaintiff to the defendant, and from thence until and at the time of the committing of the said grievance by the defendant in the said count mentioned, remained and continued due and in arrear; and the defendant afterwards, and whilst the said rent so remained due, in arrear, and unpaid as aforesaid, and during the continuance of the said demise and tenancy, to wit, on the day and year in the same count mentioned, entered into and upon the said messuage, the outer door thereof being then open, in order to distrain for the said arrears of rent, and did then and there distraint the said goods and chattels in the same count mentioned, then being in and upon the said messuage, and subject and liable to such distress, as well for a distress for the said arrears of rent so due and owing to the defendant as aforesaid, and as the defendant lawfully might for the cause aforesaid; and the defendant did thereupon, to wit, on the day and year last aforesaid, take and seize the said goods and chattels, and impound the same, as a distress for the said arrears of rent so due as aforesaid, as he lawfully might for the cause aforesaid, and did thereupon give notice to the plaintiff of such distress, and the cause of such taking; and which seizure and taking of the said goods and chattels as such distress as aforesaid, was and is the said grievance in the said last count *mentioned, and whereof the plaintiff had above complained [963 against the defendant—verification.

To this plea the plaintiff replied, that after the arrears of rent in the plea mentioned had become due and payable, and before the committing of the grievances in the last count mentioned, and before the seizing, taking, or distraining the goods and chattels in the last count, as in the plea mentioned, to wit, on the 25th of June, 1844, the defendant seized, took, and distrained divers goods and chattels of the plaintiff, other than the goods and chattels in the last count mentioned, that is to say, the goods and chattels in the first count mentioned, as a distress for the said arrears of rent in the plea mentioned, the last-mentioned goods and chattels then being in

and upon the said message, with the appurtenances, and then being subject and liable to a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, and the costs and charges of the same distress, and the appraisement and sale thereof; and the defendant then could and might and ought to have fully paid and satisfied the said arrears of rent, and the costs and charges of the said distress, the appraisement and sale thereof, out of and with the last-mentioned goods and chattels; yet the defendant, *wrongfully and vexatiously, and without any cause or excuse*, refused and neglected so to do, and, after making the distress in the replication mentioned, for the said arrears of rent, on the last-mentioned goods and chattels, to wit, at the said time when, &c., and in the same count mentioned, of his own wrong vexatiously seized and took the goods and chattels in the same count mentioned, and converted and disposed thereof to his own use, in manner and form as the plaintiff had above thereof complained against him—verification.

*964] Rejoinder, that the goods and chattels so seized, *taken, and distrained as in the replication mentioned, before the making of the said distress in the plea mentioned, were not of sufficient value to satisfy the said arrears of rent; that the defendant afterwards, and before the making of the distress in the plea mentioned, to wit, on the said 25th of June, 1844, lawfully abandoned and put an end to the said distress in the replication mentioned, and withdrew from the possession of the said goods and chattels seized, taken, and distrained under the same, and did not at any time sell or dispose of the said goods and chattels, or any part thereof, under the said distress, and that the rent so distrained for as in the plea mentioned, at the time of the making of the distress in the plea mentioned, remained and was wholly unpaid and unsatisfied; and so the defendant further said that he did not of his own wrong vexatiously make the distress in the plea mentioned—verification.

Surrejoinder, that the goods and chattels seized, taken, and distrained as in the replication mentioned, were of sufficient value to satisfy the said arrears of rent, in manner and form as in the replication alleged—concluding to the country.

Special demurrer, assigning for causes, that the surrejoinder took issue upon immaterial matter, and raised an immaterial issue, namely, whether the goods and chattels therein mentioned were of sufficient value to satisfy the said arrears of rent; that the surrejoinder did not traverse, or confess and avoid, the material allegations in the rejoinder, namely, that the defendant lawfully abandoned and put an end to the said distress, and withdrew from the possession of the said goods and chattels, and did not sell and dispose of the same, and that the said rent so distrained for, at the time

*965] of the making of the distress in the plea mentioned, remained *and was wholly unpaid and unsatisfied; and that the surrejoinder was in other respects insufficient, &c.

Joinder in demurrer.

Telford, Serjt., in support of the demurrer.(a) The surrejoinder is clearly bad, as taking issue upon an immaterial fact. The mere taking of a distress, which is subsequently abandoned, is no answer to a second distress: it is no satisfaction of the rent. This was expressly decided in *Lear v. Edmonds*, 1 B. & Ald. 157, where ABBOTT, J., said: "It is not even averred that the goods were liable to the distress: but, supposing the goods liable, one of three things must have happened; either they must have been sold, or they must have been detained until this time, or they must have been relinquished. If the goods have been relinquished at the request of the party, then the distress would not operate as a bar. As to the case cited, (b) that does not apply: there, the plea showed that the debt was satisfied by taking the body in execution under the *ca. sa.*; but the mere detaining of goods is not a satisfaction." *Lingham v. Warren*, 2 Brod. & B. 36, 4 J. B. Moore, 409, and *Hudd v. Ravenor*, 2 Brod. & B. 662, 5 J. B. Moore, 542, are to the same effect.(c)

Gaselee, Serjt., contra.(d) The cases of *Lear v. Edmonds*, *Lingham v. Warren*, and *Hudd v. Ravenor*, though *apparently strong authorities for the defendant, will be found on examination to have been somewhat hastily determined: the two latter rest entirely upon the former, the reasons for the decision of which are not very satisfactory. In *Williams's Saunders*, (e) it is said, that, "regularly, at the common law, where there is an entire duty or rent due, a man should distrain for the whole at once, and not for part at one time and part at another; for that would be oppressive and illegal; and, therefore, if he distrains a second time for the same thing, he ought to show, that, at the time of taking the first distress, there was not sufficient on the premises, or that he had mistaken the value, and that the first distress was only of such a value; otherwise the second distress will be bad." This shows that the sufficiency of the first distress is a material fact. The words of the statute 17 Car. 2, c. 7, s. 4, which authorizes a second distress, are—where the value of the cattle distrained shall not be *found by the jury* to be to the full value of the arrears distrained for, the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain again for the residue of the arrears. In *Wallis v. Savill*, 2 Lutw. 1532, the second distress was holden unjustifiable, "because both distresses were taken for one and the same rent, and

(a) The argument took place in Easter term last, before Tindal, C. J., and Coltman, Cresswell, and Erie, Js.

(b) *Robinson v. Clepton*, Cro. Car. 240.

(c) And see *Lees v. Wright*, 1 D. & R. 391.

(d) The points marked for argument on the part of the plaintiff were—1. That the surrejoinder takes issue on the only material fact stated in the rejoinder—the insufficiency of the first distress being the only circumstance stated which could justify taking the second. 2. That the statements in the rejoinder not traversed by the surrejoinder, are immaterial, and do not authorize the taking of a second distress. 3. That, although it was lawful for the defendant to abandon the first distress, it does not follow that he had any right to take a second. 4. That, it does not appear that the defendant restored the goods taken under the first distress, to the plaintiff.

(e) 1 Wms. Bound. 201 a. n. (1), citing Sir F. Moore, 7, pl. 36; *Hutchins v. Chambers*, 1 Burr. 689; *Wallis v. Savill*, 2 Lutw. 1532.

it was the lessor's folly that he had not taken a sufficient distress at first." [967] In *Hutchins v. Chambers*, 1 Burr. 589, Lord Mansfield says, "A man who has an entire duty shall not split the entire sum, and distrain for part of it at one time, and for other part of it at another time, and so, *toties quoties*, for several times; for that is great oppression." So, in Cro. Eliz. 13, (a) it is said, that, "if one taketh *trop petit* distress for rent, and after taketh another distress for the same rent, this not good; for, he cannot avow two distresses for the same rent; for, it was his folly that he took not a better distress at the first. But, *nota*, in the Abridgment of the Assizes, it is said, that, if there be not sufficient distress when he distrained, he may distrain again." *Smith v. Goodhoyne*, 4 B. & Ad. 413, and *Lear v. Caldecott*, 4 Q. B. 123, show that case or trespass will lie for maliciously distraining a second time, where a sufficient distress had previously been made for the same rent, and voluntarily abandoned. *Lear v. Edmonds* was an action for use and occupation; and it may very well be, that the landlord, by voluntarily abandoning the distress, deprives himself of his summary remedy, and yet does not forfeit the rent. Here, the defendant, by his course of pleading, has made the sufficiency of the first distress a material fact: and that distinguishes *Lear v. Edmonds*, and the two cases that depend upon it, from the present case. In *Vasper v. Eddowes*, 1 Lord Raym. 719, 1 Salk. 248, 11 Mod. 21, 12 Mod. 658, in trespass for breaking the plaintiff's close, and depasturing his grass with cattle, &c., viz, *porcis*, &c., as to all the trespass except with one hog, the defendant pleaded not guilty, and, as to that, he pleaded in bar that the plaintiff distrained the said hog then damage feasant, and impounded it in the common pound of the manor, *nomine districtionis*, &c. The plaintiff replied, confessing the distress and the impounding, that the hog, without the assent of the plaintiff, escaped out of the said pound, the plaintiff *ad tunc et adhuc* not [968] being satisfied for the said damage. Upon demurrer, it was held by Holt, C. J., and Tutton and Powys, Js., against the opinion of Gould, J., that the defendant was entitled to judgment, "because it did not appear that the hog escaped by the default of the defendant; for, perhaps it escaped by a fault in the pound; and it would be very hard that the defendant should lose his pig, and also make other satisfaction to the plaintiff for the damage done by it." That is almost decisive of the question. If the defendant had the means of satisfying himself for the rent due, it properly lies on him to show why he has not done so. The allegation traversed was clearly material. [TINDAL, C. J. There can be no doubt that the tenant has his remedy for the double distress: but the question is, whether he may bring trover, and so deprive the landlord of all remedy for the recovery of the rent.] The real question is, whether it is competent to a landlord to distrain again, for the same rent, goods that have already been seized by him and voluntarily abandoned.

Talfourd, Serjt., in reply. The question is, whether the mere fact of the

landlord having made a previous distress for the same rent, which distress he has lawfully abandoned, renders him liable to be sued in trover for a second seizure. No case has been cited that at all goes that length. [TINDAL, C. J. The older authorities seem to show such a course to be unlawful. See Comyn's Digest, title *Distress*, (A. 1.) *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

This was an action on the case. The last count of *the declaration was in trover for a quantity of household furniture and other goods and chattels. The defendant pleaded several pleas, the last of which stated, that the plaintiff was tenant to the defendant of a certain messuage with the appurtenances, under a demise made to the plaintiff at the yearly rent of 56*l.*, payable quarterly, on the 25th of March, 24th of June, 29th of September, and 25th of December; that, on the 24th of June, 1844, 28*l.* of the rent aforesaid, for half a year ending on that day, became due and payable from the plaintiff to the defendant, and continued due and in arrear; and then justified taking the goods as a distress. To this plea the plaintiff replied, that, after the arrears of rent in the plea mentioned had become due and payable, and before the committing of the grievance in the declaration mentioned, and before the taking or distraining of the goods as in the last plea mentioned, to wit, on, &c., the defendant took and distrained divers goods and chattels of the plaintiff other than those in the last count mentioned, as a distress for the said arrears of rent, the last-mentioned goods then being in and upon the said messuage with the appurtenances, and then being subject and liable to a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, &c., and the defendant then could and might and ought to have fully paid and satisfied the said arrears of rent, and the costs, &c., out of and with the said goods and chattels; yet, the defendant wrongfully and vexatiously, and without any cause or excuse, refused and neglected so to do, and, after making the said distress in the replication mentioned for the said arrears of rent on the said last-mentioned goods, &c., at the said time when, &c., of his own wrong, vexatiously seized and took the goods and chattels in the last count mentioned, and converted them to his own use. Rejoinder, that the goods and chattels taken and distrained, as in *the replication mentioned, before the making of the distress in the last plea mentioned, were not of sufficient value to satisfy the arrears of rent; and the defendant afterwards, and before the taking of the distress in the last plea mentioned, to wit, on, &c., lawfully abandoned and put an end to the distress in the said replication mentioned, and withdrew from the possession of the goods and chattels taken and distrained under the same, and did not sell or dispose of them under the said distress; and the rent distrained for as in the last plea mentioned, at the time of making the distress in that plea mentioned, remained and was wholly unpaid and unsatisfied. Surrejoinder, that the goods and chattels in the replication mentioned were of sufficient value to satisfy the said arrears of rent, as in the replication alleged. To

this surrejoinder the defendant demurred specially, on the ground that it took issue upon an immaterial matter, and did not traverse or confess and avoid the material allegations in the rejoinder, viz., that the defendant lawfully abandoned the first distress and withdrew from possession, and that the rent remained due.

On the argument before us, in Easter term last, it was contended, in support of the demurrer, that a distress taken, and abandoned without sale, did not satisfy the rent; and that, consequently, the landlord was not liable to be sued in trover for making a second distress; and that it was not material whether the goods first distrained were or were not of sufficient value to satisfy the arrears of rent, if the distress was abandoned before sale, and the rent remained due: and *Lear v. Edmonds*, 1 B. & Ald. 157; *Lingham v. Warren*, 2 Brod. & Bingh. 36, 4 J. B. Moore, 409, and *Hudd v. Ravenor*, 2 Brod. & Bingh. 662, 5 J. B. Moore, 542, were cited as authorities for these positions. *On the other hand, it was contended, *971] that, if a landlord distrains for rent arrear, goods sufficient to satisfy that rent, and wantonly abandons the distress, he cannot lawfully make a second for the same rent, although it may remain due; and that, for such second distress, he may be sued in trespass or trover; and, consequently, if the defendant's rejoinder was good, that could only be on the ground that the sufficiency of the first distress was material, and then the surrejoinder must be good also: and Cro. Eliz. 13; (a) *Smith v. Goodwin*, 4 B. & Ad. 413; *Lear v. Caldecott*, 4 Q. B. 123, and other cases, were relied on.

When the case was argued, it appeared somewhat difficult to reconcile all the decisions that were brought to our notice. We therefore took time to look into them; and now we are of opinion, that, upon these pleadings, our judgment must be for the plaintiff.

The replication is a good answer to the plea; for, assuming that the rent remained due, not having been satisfied by the first distress, (and the case of *Lear v. Edmonds*, 1 B. & Ald. 157, certainly did not go beyond that,) still the landlord could not, under the circumstances stated in the replication, make a second distress. In Com. Dig. *Distress*, (A. 1,) it is laid down that "a man cannot take two distresses for the same rent, for, it was his folly that he did not take sufficient at first." In that passage, it is assumed that he might have taken sufficient at first: in this replication it is averred that he did take sufficient at first. Lord Chief Baron COMYNS refers to Moore, 7, Cro. Eliz. 13, (which was cited on the argument,) and Lutw. 1536. The case in Moore is a strong authority for the present plaintiff: it is thus—"A man distrained, for 10*l.* rent, due at Michaelmas by *972] reservation, certain sheep which were not of the value of 40*s.*, and afterwards distrained for the residue; and the tenant made several replevins. The question was, if he could make an avowry; MONTAGUE, HINDE, and HARRIS—You cannot; for, the distress is not good; and it is the folly of the lessor that he would so distrain in the first instance. MONTAGUE

Recaption lies for the second distress. BROWN: If a man be in arrear of his rent *at several days*, and takes a distress for one day at one time, and for another day at another time, he may: but it is otherwise in the case at bar.* The case of *Wallis v. Savill*, 2 Lutw. 1532, is an authority for the same position, that a man cannot take a second distress for the same rent, when he might have taken sufficient at first. Nor shall we, by acting upon these authorities, overrule *Lingham v. Warren* or *Hudd v. Ravenor*. In the former the plaintiff declared in replevin: avowry for rent arrear: plea in bar, that the defendant's testator for the same rent distrained goods and chattels of sufficient value to satisfy it; and, on demurrer, this was held to be a bad plea, on the ground that "many cases are supposable in which the taking a sufficient distress might not produce a satisfaction of the rent," which is undoubtedly true. In *Hudd v. Ravenor*, also, the declaration was in replevin, the avowry for rent arrear, and the plea in bar alleged a former distress for the same rent, and that the defendant might thereby have paid the arrears of rent, &c., but neglected and omitted so to do, and wrongfully and vexatiously made a second distress for the same rent. The plea was held bad, on the authority of *Lear v. Edmonds* and *Lingham v. Warren*. The judgment of RICHARDSON, J., shows clearly the ground of the decision; viz., that the former distress might have been relinquished in kindness to the tenant, and that no issue could have been taken on the words "neglected and omitted." In the present case the replication goes much further, and says that the defendant vexatiously, and without any cause or excuse, refused to satisfy the arrears of rent by means of the first distress. We do not, therefore, at all impugn those cases, by holding that this replication is good. [973]

It remains to be considered whether the rejoinder gives any sufficient answer to the replication. The rejoinder alleges that the goods distrained in the first instance were not of sufficient value to satisfy the arrears, and that the defendant afterwards lawfully abandoned and put an end to that distress. If that can be read so as to make the insufficiency of the goods distrained the ground for abandoning the distress, the averment of insufficiency is material, and the surrejoinder traversing it is good: but, if it cannot be so read, the rejoinder is bad, by reason of its not showing any lawful ground for relinquishing the first distress, and taking a second, so as to answer the matters alleged in the replication. In either view, therefore, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

*974]

*ALLPORT v. NUTT. July 2.

To debt for money had and received, the defendant pleaded, that a certain race was about to be run, and that an illegal game called a lottery, not authorized by law or act of parliament, was set up by the defendant for certain subscribers of 1*l.* each, (in the whole amounting to 155,) to be paid to the defendant under regulations in substance as follows:—that the subscriber whose name should be drawn out of a box next after the name of the horse, (drawn from another box,) which horse should be placed first in the race, should be entitled to receive from the defendant 100*l.* The plea then alleged that the subscriptions were paid by the plaintiff and others to the defendant, and that the plaintiff, under the regulations, became entitled to the 100*l.*:—*Held*, that the plea disclosed a transaction within the prohibition of the lottery acts 10 & 11 W. 3, c. 17, and 42 G. 3, c. 119.

Held, also, that, supposing the transaction to be more properly a bet, it was an illegal bet. *Held*, also, that the plea was good in form, as setting up illegality of consideration by statute.

DEBT, for 100*l.* had and received by the defendant for the plaintiff's use, and for 100*l.* due upon an account stated.

The defendant pleaded,—first, except as to 1*l.*, parcel, &c., never indebted.

Secondly, as to 99*l.*, parcel of the moneys in the first count mentioned, and as to 99*l.*, parcel of the moneys in the last count mentioned, (the same sums being other and different parcels from the aforesaid sum of 1*l.*, parcel, &c., in the first plea mentioned, and therein excepted)—that, before the having or receiving by the defendant of the sum of money in the first count mentioned, and before the said statement of the said account and the making of the said promise in the declaration mentioned, a certain race, to wit, a horse-race, called the Derby Stakes, in which divers, to wit, 155 horses were proposed to run, was about, to wit, on the 22d of May, 1844, to be run, to wit, upon a certain course called Epsom Downs, in the county of Surrey: that, before the having or receiving by the defendant of the said sum of money in the first count mentioned, or any part thereof, and before

*975] the said statement of the "said account, and before the making of the promise in the declaration mentioned, to wit, on the 20th of February, 1844, a certain illegal game called a lottery, not authorized by law or act of parliament, was, contrary to the form of the statutes in such case made and provided, by the defendant set up, kept open, and exposed to be played and drawn at by lot, at and in a certain public-house and inn, called and known by the name or sign of The George and Gate, situate in the city of London, under and subject to the following (amongst other) terms, rules, and regulations, that is to say, that the adventurers and subscribers in and to the said game might consist of as many as, but not of more than 155 members,—that each of those adventurers and subscribers should contribute and pay the sum of 1*l.* for his playing in the said game, and the chance of his drawing a prize therein,—that the said contributions and payments should be made to the defendant, who should be the treasurer,—that, before the running of the said race, the name of each one of the horses entered for the running thereof, should be put on a several and separate card, making together 155 cards,—and that all of those cards should afterwards, and before the running of the said race, be placed in a box, and be mixed up together therein in one general mass,—and that the

name of each one of the several persons respectively who had become adventurers in, and subscribers to, the said game, should be put on a several and separate card, making together 155 cards,—and that all of those cards should also, before the running of the said race, be placed in another box, and mixed up together therein in one general mass,—and that before the running of the said race, two disinterested persons should draw the said cards out of the said boxes, in the following manner, that is to say, that one of those two persons should openly, and as chance should direct, first draw out of the said box containing the cards with the names of the said horses so put thereon, one of those cards, and that the other of the said two disinterested persons should openly, and as chance should direct, then draw out of the said other box, containing the cards with the names of the said adventurers and subscribers put thereon, one of those cards,—and that the said two disinterested persons should continue drawing in that manner alternately, openly, and as chance should direct, out of the said boxes, the whole of the said cards,—and that the person whose name was on the card drawn out of the said box containing the cards with the names of the said adventurers immediately succeeding the drawing of the cards out of the said box containing the said cards with the names of the said horses so put thereon aforesaid, on which card was put the name of the horse that, on the running of the said race, should be placed by the person who should be the judge of the said race, as the winner thereof, should win, and after the running of the said race be entitled to receive from, and be paid by the defendant, the prize or sum of 100*l.*, out of the money so to be subscribed and deposited with, and paid to the defendant, as treasurer as aforesaid, contrary to the form of the statutes in such case made and provided : that, the said illegal game having been so set up, kept open, and exposed to be played and drawn at in manner aforesaid, the plaintiff and divers, to wit, 154 other persons, afterwards, to wit, on the 21st of February, 1844, and on divers other days and times afterwards, and before the drawing of the said game as thereafter mentioned, according to the said terms, rules, and regulations, became, and were respectively adventurers in, and subscribers to, the said game, to the amount of the said sum of 1*l.* each ; and they then, as such adventurers and subscribers, contributed and paid the said sum of 1*l.* each, and the amount of the sums so contributed and paid to them as aforesaid, came, altogether, to the sum of 155*l.*, and the same were in pursuance of the said terms, rules, and regulations, on the said days and times, paid to, and received by the defendant, as such treasurer as aforesaid : that afterwards, and before the running of the said race, to wit, on the 6th of April, 1844, in pursuance of the said terms, rules, and regulations, and in furtherance of the said illegal game, the name of each one of the horses entered for the running of the said race was put on a several and separate card, making together 155 cards, and all of those cards were then placed in a box, and mixed up together therein in one

general mass, and the name of the plaintiff and of each one of the said several other persons who had become adventurers in, and subscribers to the said game, was then also put on a several and separate card, making together 155 cards, and that all of those cards were then placed in another box and mixed up therein in one general mass: that, in pursuance of the said terms, rules, and regulations, and in furtherance of the said illegal game, afterwards, and before the running of the said race, to wit, on the day and year last aforesaid, two disinterested persons, whose names were to the defendant unknown, then respectively drew the said cards respectively out of the said boxes, in the manner and form, and according to the terms, rules, and regulations aforesaid, that is to say, one of those two persons then openly, and as chance directed, first drew out of the said box containing the cards with the names of the said horses so put thereon as aforesaid, one of those cards, and the other of the said two persons then openly, and as chance directed, drew out of the said other box containing the cards with the names of the plaintiff and the said other adventurers in, and subscribers to the said game, put thereon, *one of those cards, and the said two disinterested persons then continued drawing in that manner alternately, openly, and as chance directed, out of the said boxes, the whole of the said cards; and, on that occasion, one of the said two disinterested persons then drew, openly, and as chance directed, out of the said box containing the said cards with the names of the said horses thereon, according to the said terms, rules, and regulations, a card with the name of a horse thereon, to wit, a horse called Running Rein, which had been and was proposed and entered to run, and was about to run the said race, and then immediately succeeding such drawing, the said other disinterested person drew out of the said box containing the cards with the names of the plaintiff and the said other adventurers in, and subscribers to the said game, according to the said terms, rules, and regulations, a card with the name of the plaintiff thereon; contrary to the form of the statute in such case made and provided: that afterwards, and before the commencement of the suit, to wit, on the 15th of May, 1844, the aforesaid race was run, and the said horse called Running Rein, whose name was put on the said card so drawn as aforesaid, was on the running of the said race placed by one Clark, the person who was the judge of the said race, as the winner thereof, whereby the plaintiff, according to the said terms, and rules, and regulations of the said illegal game, became, and was entitled to receive from, and be paid by the defendant, the said sum of 100*l.*, out of the moneys so subscribed and deposited with, and paid to the defendant as aforesaid: that the said sum of 99*l.*, parcel of the moneys in the first count mentioned, and to which that plea was pleaded, was parcel of the same identical sum of 100*l.* to which the plaintiff became, and was entitled, under the terms, rules, and regulations of the said game, to receive from, and be paid by *the defendant as aforesaid, out of the moneys so subscribed and deposited with and paid to the defendant as

aforesaid, and not any other or different sum of money; and that the same consisted wholly and exclusively of portions of the contributions and moneys so subscribed and paid to, and received by the defendant as aforesaid, from the said adventurers in, and subscribers to the said game, other than the plaintiff: and that the said sum of 99*l.*, so being such parcel as aforesaid, was received and always held by the defendant as such treasurer as aforesaid, and due to the plaintiff, and to which he was entitled as aforesaid, and in manner in that plea, and not otherwise howsoever: and that the said account in the last count mentioned to have been stated by, and between the plaintiff and the defendant, so far as the same related to the said sum of 99*l.*, parcel, &c., as aforesaid, and to which that plea was pleaded, was stated by and between the plaintiff and the defendant, of and concerning the said sum of 99*l.*, so received and held by the defendant as such treasurer as aforesaid, in manner aforesaid, and not for or concerning or in respect of any other moneys, or any other account whatsoever—verification.

Thirdly, payment into court of 1*l.*, and no damages *ultra*.

The plaintiff demurred specially to the second plea, assigning for causes (amongst others) that it contained no answer to the causes of action to which it was pleaded, and that the matters therein stated and contained showed no sufficient cause or excuse for the non-payment by the defendant to the plaintiff of the said sum of 99*l.*, parcel, &c., as to which that plea was pleaded, and which the plaintiff in and by the plea was admitted to have become and to be entitled to receive from the defendant, according to the agreement in that *plea mentioned, out of the moneys so subscribed and deposited in the hands of the defendant as in that plea mentioned; that the method of determining the right of the plaintiff to the moneys as to which the plea was pleaded, as the same was stated, set forth, and described in the plea, was not an illegal game; or a lottery not authorized by law, as the same in and by that plea was styled and called, but was in fact a mode of betting by each of the so-called adventurers or subscribers in the plea mentioned, to a small and legal amount or stake in that behalf, upon the horse-race therein mentioned, being a lawful horse-race; that neither in the agreement in the plea mentioned, nor in the drawing of cards in that plea also mentioned, nor in the horse-race therein also mentioned, was there shown to have been any illegality whereby the right of the plaintiff to receive the said sum of 99*l.*, parcel, &c., from the defendant, was, or is, or should be taken away; that the cause of action of the plaintiff in respect of the said sum of 99*l.* was not by the plea shown to be founded upon an illegal contract or consideration; that it was not shown, nor was it stated, in or by the plea, that the race in the plea mentioned was an illegal race, or contrary to any law or statute; that, although it was stated in and by the plea, that the agreement and the drawing of cards therein mentioned were contrary to the form of some supposed statute, or statutes, it was not stated, neither did it appear with sufficient or any certainty in or by the plea what

statutes were intended; that the plea, though it professed to be in confession and avoidance, did not sufficiently confess the cause of action to which it was pleaded; that the plea presented no material fact or facts, averment or averments, upon which a traverse could be taken; that it was circuitous, *981] and stated at unnecessary length, and with needless particularity, "facts which constituted matter of evidence only; that it amounted to the general issue, and was in other respects uncertain, informal, and insufficient, &c.

The defendant joined in demurrer. (a)

Byles, Serjt., in support of the demurrer. (b) The plea is bad in substance as well as in form. Whether the transaction it discloses is supposed to be an illegal bet, or an offence against the lottery acts, enough is not shown to bring it within any of the statutes. In the first place, this clearly was not an illegal wager or bet upon the result of a horse-race. The first statute upon the subject is the 16 Car. 2, c. 7, which is intitled "An act against deceitful, disorderly, and excessive gaming." The second section applies only to "any fraud, shift, cousenage, circumvention, deceit, or unlawful device or ill practice," in gaming, horse-racing included: and the third section is levelled at *excessive* gaming, imposing penalties on persons winning and losing more than 100*l.* at one time upon ticket or credit. *ROLFE*, B., in delivering the judgment of the court of Exchequer in *Apple-garth v. Colley*, speaking of this and a subsequent statute, says: (c) "One great object of the statutes of Charles II. and Anne (both of which must be *982] construed together) was to prevent "gaming on credit, and to confine parties who were playing for money to such sums as they should pay down at the time of the play. Now, we are of opinion, that money deposited in the hands of a stake-holder before a game is played or a race run, to be handed over to the winner, is precisely that sort of transaction that the legislature, supposing that the parties were to engage in play at all, meant to encourage, and not to prohibit. It is in no fair sense gaming upon credit or ticket. It is in truth the only sort of gaming for ready money which the nature of the case admits. The legislature most wisely thought that they might with comparative safety trust persons to play for money, if payment of all losses was made at the time and on the spot, and not deferred to a future occasion. The deposit with the stake-holder is ready-money payment in the strictest sense. All parties part with their money before the game begins. The stake-holder holds it as agent for the winner; and when

(a) The points for argument on the part of the plaintiff were a mere repetition of the causes of demurrer.

Those delivered on the part of the defendant were as follow:—"That the plea is sufficient: that it shows a valid defence to the causes of action to which it is pleaded: that it shows that the money was received for the purposes of an illegal lottery: that there was no occasion to set forth in any other way than it does the statutes by which the said lottery was illegal: that it need not have stated the statute or statutes at all: and that it does not amount to the general issue."

(b) The argument took place in Easter term last before Tindal, C. J., and Coltman, Cresswell, and Erie, J.

(c) 10 M. & W. 732.

the winner is ascertained by the result of the game, he has a right to treat the stake-holder as having gotten into his hands money which, in the result of a lawful transaction, turns out to belong to him, the winner. The case appears to us to be entirely out of the mischief which this branch of the statute was intended to remedy, and not to come within its provisions." The first section of the 9 Ann. c. 14, is repealed by the 5 & 6 W. 4, c. 41, s. 1. The second section enacts, that any person who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole, the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same, may, within three months, recover the same in an action of debt, &c. And, in *Shillito v. Theed*, 7 Bingh. 405, 5 M. & P. 303, it was held that a wager exceeding 10*l.*, upon a legal horse-race, was illegal, the statutes 13 G. 2, c. 19, and 18 G. 2, c. 34, legalizing horse-racing only, and not bets made at races. Here, however, no one individual could lose 10*l.*; the case, therefore, is not within the second section of the 9 Ann. c. 14; nor is it within the fifth section, which, like the second section of the 16 Car. 2, c. 7, only applies to parties winning "by any fraud or shift, cousenage, circumvention, deceit, or unlawful device or ill practice."

Then, is this transaction an offence against the lottery acts? The difference between a lottery and a sweepstakes is this: in a lottery, the party setting it up receives from the purchasers of tickets more than the value of the prizes; whereas, in a sweepstakes, all the money obtained from the subscribers is paid over to the winners; the party to whom the subscriptions are paid is a mere stake-holder. The first act, 10 & 11 W. 3, c. 17, recites that "several ill-disposed persons, for divers years last past, had set up many mischievous and unlawful games, called lotteries, and had thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders, and merchants, and from other unwary persons, to the utter ruin and impoverishment of many families, and to the reproach of the English laws and government, by colour of several patents or grants under the great seal of England for the said lotteries, or some of them; which said grants or patents were against the common good, trade, welfare, and peace of his majesty's kingdom:" and, for remedy thereof, it is, by s. 1, "enacted, adjudged, and declared, that all such lotteries, and all other lotteries, are common and public nuisances, and that all grants, patents, and licenses for such lotteries, or any other lotteries, are void and against law." [CRESSWELL, J. The mischief intended to be remedied, is, the introduction of a spirit of speculation and gambling, tending to the ruin and impoverishment of families, and not, as you suggest, the gain acquired by the individual. Suppose a horse were sold by tickets amounting in the aggregate to the true value;

would not that be a lottery?] That probably would be held illegal. No game at cards for an accumulated stake can be legal, if this transaction be not so.

Assuming that the lottery acts are to be construed so largely as to embrace this case, still a lottery to be determined by the event of a legal home-rate, is not prohibited. The 8 G. 1, c. 2, s. 36, recites, that "notwithstanding the provision already made by several acts of parliament for suppressing and preventing of unlawful lotteries, and offices and places, under the denomination of sales, and taking or making, buying or selling subscriptions for the sale of chances, or part of chances, to arise on tickets made out in pursuance of any act of parliament for a public lottery, many ill-disposed persons, with a design to evade such laws, have of late presumed, and do daily presume, to erect and set up offices or places under the denomination of sales of houses, lands, plate, jewels, ships, goods, and other things; and also have presumed to make, print, and publish, and cause to be made, printed, and published, proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by the chances of the prizes in some public lottery or lotteries established or allowed by act of parliament, and to deliver out tickets to the persons advancing such sums, to entitle them to

1985] a share of the money so advanced, according to such proposals, and advertisements thereof are daily published in the common printed newspapers and otherwise; which practices are highly prejudicial to the public and to the trade of this kingdom, and tend to defraud his majesty's subjects:" it then proceeds to enact "that all and every person or persons who, after the 21st of December, 1721, shall erect, set up, continue, or keep, or cause, &c., any office or place, under the denomination of sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other things, for the improvement of small sums of money; or shall sell, or expose to sale, any houses, lands, &c., by way of lottery, or by lots, tickets, numbers, or figures; or shall make, print, advertise, or publish, or cause to be made, printed, advertised, or published, proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by the chances of the prizes in some public lottery or lotteries established or allowed by act of parliament; or shall deliver out, or cause or procure to be delivered out, tickets to the persons advancing such sums, to entitle them to a share of the money so advanced, according to such proposals or schemes; or shall make, print, or publish, or cause to be made, printed, or published, any proposal or scheme of the like kind or nature, under any denomination, name, or title whatsoever"—shall, on conviction, forfeit 500*l*. And the thirty-seventh section enacts that all and every person and persons who shall be adventurer or adventurers in, or shall pay any money or other consideration, or any ways contribute unto, or upon the account of, any such sales, lotteries, proposals, or schemes aforesaid, shall forfeit, for every such offence

double the sum paid or contributed. The 12 G. 2, c. 28, s. 1, recites the 10 & 11 W. 3, c. 17, 9 Ann. c. 6, 10 Ann. c. 26, 8 G. 1, c. 2, and 9 G. 1, c. 19; and that "several persons have for many years past carried on and set up certain fraudulent games and lotteries, to be determined by the chance of cards and dice, under the denomination of the games of the ace of hearts, pharaoh, basset, and hazard, and thereby defrauded several of his majesty's subjects, ignorant of the great disadvantage adventurers in the said games and lotteries so denominated the games of the ace of hearts, pharaoh, basset, or hazard, are under, subject, and liable to; and that doubts had arisen whether the said games of the ace of hearts, &c., were within the descriptions of the lotteries prohibited by the said recited acts;" and s. 2 enacts and declares those games to be games or lotteries by cards or dice within the intent and meaning of the recited acts, and imposes certain penalties. The 42 G. 3, c. 119, ss. 2, 5, carries the case no further. All the acts contemplate a scheme, whereby the actor is attempting to enrich himself at the expense of the community. The plea in this case discloses nothing more than a mode of betting on a legal horse-race, no single individual staking more than 1*l*. [CRESSWELL, J. Each individual, in effect, bets the 155th part of a sovereign to a sovereign, against the field.] In no view can the case fall within either the gaming or the lottery acts. [*986]

At all events, the plea is clearly bad in form. It amounts to a plea of *nonquam indebitatus*; for, the illegality, if any was committed, was committed before the stakeholder received the money, and, therefore, he never did receive it to the use of the plaintiff: and this might have been given in evidence under the general plea.

Channell, Serjt., contra. The plea is good in form. It confesses that, *prima facie*, the money was had and received to the plaintiff's use, and avoids the effect of that admission by showing the illegality of the consideration, which, according to *Martin v. Smith*, 4 New Cases, 436, 6 Scott, 268, must be pleaded specially. [*987]

The plea is also good in substance. It discloses an implied contract by the defendant to pay money in consequence of something that amounts to an illegal lottery. It appears that the members of this club or association were to consist of 155, from each of whom the defendant was to receive 1*l*.; and that the winner was to get "the prize or sum of 100*l*. The question turns upon the 10 & 11 W. 3, c. 17, and the 42 G. 3, c. 119. This case is clearly within the mischief the first-mentioned statute was designed to remedy. The 42 G. 3, c. 119, recites that "evil-disposed persons do frequently resort to public houses and other places, to set up certain mischievous games or lotteries called *little goes*, and to induce servants, children, and unwary persons to play at the said games, and thereby most fraudulently obtain great sums of money from servants, children, and unwary persons, to the great impoverishment and utter ruin of many families;" and enacts "that all such games or lotteries called *little goes* shall, from and

after the passing of this act, be deemed, and are hereby declared, common and public nuisances, and against law." And s. 2 enacts "that no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a *little go*, or any other lottery whatsoever, not authorized by parliament, or shall knowingly suffer to be exercised, kept open, &c., any such game or lottery in his or her house, room, or place, upon pain of forfeiting for every 988*] such offence 100*l.*," &c. The evil is not diminished by making "the contingency double: on the contrary, the more the contingencies are diversified, the more the mischief is increased. In this case, more than 10*l.* in the aggregate is lost, though each subscriber loses only 1*l.*: and this, according to the case of *Shillito v. Theed*, 7 Bingh. 405, 5 M. & P. 303, is clearly illegal. [EALE, J., referred to the 18 G. 2, c. 34, s. 8, and to the case of *Lord George Bentinck v. Connop*, 5 Q. B. 693.

Byles, Serjt., in reply, submitted that the acts in question, being highly penal, must receive a strict construction. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

This was an action for money had and received. The plea states that a race was about to be run; and that an illegal game called a lottery, not authorized by law or act of parliament, was set up by the defendant for certain subscribers of 1*l.* each, to be paid to the defendant under regulations which amounted in substance to this, that the subscriber whose name should be drawn out of a box next after the name of the horse was drawn out of another box, which horse should be placed first in the race, should be entitled to receive from the defendant 100*l.* The plea then alleges that the subscriptions were paid by the plaintiff and others, to the defendant, and that the plaintiff, under the regulations, became entitled to the sum in demand. To this plea there was a demurrer; and, in support thereof, it was contended before us, on the part of the plaintiff, that the statutes for the suppression of lotteries were to be restricted in their construction to lotteries of the same description with those mentioned in the respective pre- 989*] ambles "thereto, or, at least, to lotteries in which an unfair advantage was taken; and that they did not render illegal the lottery in question, which, as far as appeared, was perfectly fair.

We are of opinion, however, that those statutes are not to be so restricted; but that, on the contrary, effect is to be given to the clear words of general prohibition contained in them, and that the lottery in question is illegal.

The 10 & 11 W. 3, c. 17, recites the mischiefs from certain lotteries under colour of certain patents and grants; and then enacts, not only that all such lotteries, but also that *all other lotteries*, are nuisances, and imposes a penalty on all persons who shall draw at any lottery. The 42 G. 3, c. 119, recites the mischiefs from certain lotteries called "*little goes*," and enacts that any person who shall keep any place to keep open any lottery called a

little go, or any other lottery whatsoever, not authorized by act of parliament, shall forfeit 500*l*. And we think it would be in contravention of the express words and clear intention of these statutes if we held that the lottery in question can be excepted from the operation of these very general words.

It was also contended that the plaintiff's cause of action was not derived from a lottery, but was more properly in the nature of a bet of a less sum than 10*l*. upon a lawful race, and upon that ground was to be considered a lawful wager. We are of opinion, however, that this ground cannot be maintained, as well because it appears in the plea that the plaintiff's cause of action depends entirely on the lottery, as also because, even admitting the cause of action to arise from a bet, without a lottery, the plaintiff could not by law recover the sum in question, it being, if a bet, a bet by which he will recover the sum of 100*l*. But, as we shall have occasion to consider this precise question more fully in *the case of Thorpe v. Coleman*, (a) in which we propose to give judgment this day, it will be unnecessary to enlarge upon it at present. [*990]

The plea, therefore, as it appears to us, shows that the cause of action was illegal by statute; and we think that the objection taken in argument, that the plea amounted to the general issue, and was therefore bad upon that ground, cannot be supported; for, as the defence set up is the illegality of the transaction, a special plea was necessary, under the new rules.

The defendant, therefore, is entitled to judgment in his favour.

Judgment for the defendant.

(a) Next case.

THORPE v. COLEMAN. July 2.

A bet of 10*l*. on a legal horse-race is within the prohibition of the 9 Ann. c. 14, and therefore not recoverable in a court of law.

And the remedy given by the statute of Anne is not suspended by the operation of the 7 & 8 Vict. cc. 3 and 58.

ASSUMPSIT. The first count of the declaration stated, that, at the time of the making of the agreement and promise of the defendant thereafter next mentioned, a certain race called the Derby, for a certain sweepstakes amounting, to wit, to 4000*l*., was intended, and about, to be run over a certain course called the Derby course, at a certain place, to wit, at Epsom, and it was then expected that a certain horse called Orlando, and a certain other horse called Campanero, and also certain other horses, would run the said race over the said course for the said stakes; and thereupon, theretofore, to wit, on the 1st of May, 1844, it was agreed by and between the plaintiff and the defendant, that, if the said horse called Orlando, in running the said race, should beat the said horse called

*991] Campunero and the *said other horses which should run the said race over the said course for the said stake, and should win the said race, he, the defendant, should pay the plaintiff the sum of 10*l.*; but that, if the said horse called Campunero, in running the said race, should beat the said horse called Orlando and the said other horses which should run the said race over the said course for the said stakes, and should win the said race, he, the plaintiff, should pay to the defendant 10*l.*: mutual promises: averment, that afterwards, to wit, on the 22d of May in the year aforesaid, the said race for the said stakes was run by and between the said horse called Campunero and the said horse called Orlando and divers, to wit, twenty other horses, over the said course; and that, in running the said race, the said horse called Orlando did beat the said horse called Campunero and the said other horses so running as aforesaid, and did win the said race; whereof the defendant then had notice, and was then requested by the plaintiff to pay the sum of 10*l.*; yet the defendant, not regarding the said agreement, nor his said promise, had not paid the said sum of 10*l.*, or any part thereof, to the plaintiff, although often requested so to do, but had neglected, &c., and the same still remained wholly due and unpaid to the plaintiff.

The defendant pleaded, amongst other pleas, that two persons, to wit, Jonathan Peel, Esq., and Sir Gilbert Heathcote, Bart., and certain other persons whose names were to the defendant unknown, before and at the time of the making of the agreement and promise in the first count mentioned, to wit, on the 1st of May, 1844, were playing at a certain game called horse-racing, and were respectively intending, and about, to cause the horses in the first count mentioned, to run the horse-race in the first count mentioned, in and about the said playing, and as part of the said

*992] *game, in manner following, that is to say, by the said Jonathan Peel causing the said horse called Orlando, and a certain other horse, so to run, and by the said Sir Gilbert Heathcote causing the said horse called Campunero so to run, and by the said persons whose names were to the defendant unknown, respectively each of them causing one of the remaining horses in the first count mentioned so to run; and that the said intention of the said persons then caused the said expectation in the first count mentioned—of all which premises respectively the plaintiff and the defendant respectively before and at the time of the making of the agreement in the first count mentioned had notice: that the agreement in the first count mentioned was made as therein was mentioned, after the 1st of May, 1711, to wit, on the day and year in the first count mentioned, and was an agreement whereby the plaintiff and the defendant betted the sum of 10*l.* to the sum of 10*l.*, being the said sums of 10*l.* and 10*l.* in the first count mentioned, on the sides of the said Jonathan Peel so far as he was about, and intended, to cause the said horse called Orlando so to run as aforesaid, and of the said Sir Gilbert Heathcote, that is to say, on their sides in the said game—he, the plaintiff, by the said

agreement; so then betting as aforesaid on the side of the said Jonathan Peel in respect of the said horse called Orlando, so by him the said Jonathan Peel intended to be caused to run, and he the defendant thereby so then betting on the side of the said Sir Gilbert Heathcote in respect of the said horse called Campunero: and that the defendant then, after the 1st of May, 1711, to wit, on the said 22d of May, 1844, at one and the same time, by so as aforesaid betting on the side of the said Sir Gilbert Heathcote, so as aforesaid then playing at the said game, lost to the plaintiff the said sum of 10*l.*, &c., by him the defendant bet as aforesaid; and which was the said *sum of 10*l.* so in the first count alleged not to have been paid by him the defendant—against the form of [*993 the statute in such case made and provided—verification.

To this plea the plaintiff demurred generally.(a)

Byles, Serjt., (with whom was Sir *John Bayley*,) in support of the demurrer.(b) It will not be contended that horse-racing is not a game, within the statute 9 Ann. c. 14: nor is it apprehended that reliance will be placed, on the other side, upon the 16 Car. 2, c. 7, the first section of which applies only to *deceitful*, and the second to *excessive* gaming—*Applegarth v. Colley*, 10 M. & W. 723, 732, 2 Dowl. N. S. 223. But it is submitted that the transaction stated in the plea was an illegal bet, within the statute of Anne. The material clauses of that statute are, the first, the second, and the fifth. The first section enacts, “that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever—given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole, or any part, of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place *of such play, to any person or persons so gaming or [*994 betting as aforesaid, or that shall, during such play, so play or bet,—shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever,” &c. Formerly, it was held that the security only, and not the contract, was rendered void by the statute: *Barjeau v. Walmsley*, 2 Stra. 1249; *Alcinbrook v. Hall*, 2 Wils. 309; *McAllister v. Haden*, 2 Campb. 438; *Robinson v. Bland*, 1 W. Blac. 260. But, in *Young v. Moore*, 2 Wils. 67, this court thought that the contract was made void as well as the security. In *McKinnell v. Robinson*, 3 M. & W. 434, the court of Exchequer held that money lent for the purpose of

(a) The points marked for argument on the part of the plaintiff were—that horse-racing is not a game, within the statute 9 Ann. c. 14, s. 2; and that the bet declared on was not a bet, within the meaning of that statute.”

(b) The argument took place in Trinity term, before Tindal, C. J., and Coltman, Maule, and Cresswell, J.

gaming and playing with at an illegal game, such as hazard, could not be recovered back: and Lord ABINGER, speaking of *Robinson v. Bland*, says: "The action was not for money lent for the purpose of playing at a game expressly prohibited by the statute 12 G. 2, or any other act, but for money lent, exceeding 10*l.*, for the purpose of playing with it; and the propriety of the decision, upon the construction of the statute of Anne itself, may well be questioned, as there is much weight in the observation made in the subsequent case of *Young v. Moore*, that, as the statute has made all securities for money won at play void, *à fortiori* all parol contracts of that sort are void." Again, in *Applegarth v. Colley*, ROUSE, B., referring to *Young v. Moore*, says that there "the court of Common Pleas held that the statute, by necessary implication, made void the contract as well as the security; and it is evident that this court, in *McKinnell v. Robinson*, inclined to that as the more reasonable view of the law. The ground suggested by Lord MANSFIELD, viz., that the object of the legislature was, to give the courts an opportunity of looking into the merits of

*995] the consideration, is *evidently untenable. The nature of the consideration would be brought before the court as well in an action on a promissory note or bill of exchange, as in an action on the contract. Besides, if the consideration is legal, what is there for the court to inquire into, and why, in such a case, should the legislature avoid the security at all? We have adverted to this section of the statute, and the authorities upon it, as they were much pressed in the argument, though, in truth, in our view of the case, they do not apply to the question before us; and we only think it necessary to add on this point, that, whatever might have been the opinion of this court as to the true construction of the clause in question, if we had been called upon to balance the authority of the earlier decisions against each other, and to decide between them, it is not now necessary to do so: for, we think that the legislature, in passing the 5 & 6 W. 4, c. 41, has in fact pronounced its decision upon this point. That act, while it repeals so much of the statute of Anne as makes the securities void, expressly enacts that they shall be deemed to have been given on an illegal consideration: and it is impossible to impute to the legislature an intention so absurd as that the consideration should be good and capable of being enforced, until some security is given for the amount, and then that by the giving of the security the consideration should become bad." It is submitted, however, that the 5 & 6 W. 4, c. 41, does *not* make the contract void. The title of that act is, "An act to amend the law relating to securities given for considerations arising out of gaming, usurious, and certain other illegal transactions." The first section recites, amongst others, the statutes 16 Car. 2, c. 7, 9 Ann. c. 16, and the 6 G. 4, c. 16, s. 122, which enacted, "that any contract or security made or given by any bankrupt, or other person, unto, or in trust for, any creditor, or for securing the pay-

ment of "any money due by such bankrupt, at his bankruptcy, as a consideration, or with intent, to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue, and give that act and the special matter in evidence:" and it further recites, that securities and instruments made void by virtue of certain of the recited acts, were sometimes endorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given; and that the avoidance of such securities or instruments in the hands of such purchasers or other persons, is often attended with great hardship and injustice: and it then proceeds to enact that so much of the acts mentioned "as enacts that any note, bill, or mortgage shall be absolutely void, shall be, and the same is, hereby repealed; but, nevertheless, every note, bill, or mortgage, which, if this act had not been passed, would, by virtue of the said several lastly hereinbefore-mentioned acts, or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several acts shall have the same force and effect which they would respectively have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration: provided always that nothing herein contained shall prejudice or affect any note, bill, or mortgage which would have been good and valid if this act had not been passed." And sect. 2 enacts that "money paid to the holder of such securities shall be deemed to be paid on account of the person to whom the same was originally given. The object of this act is, to protect innocent endorsees without notice, but to leave the contract as between the original parties, as it stood before: where no security has been given, it has no operation at all upon the 9 Ann. c. 14. The court must, therefore, balance between the authorities already referred to as to the meaning of the word *security*; which, it is submitted, must have regard to things *ejusdem generis* with those mentioned in the act.(a)

At all events, the statutes 7 & 8 Vict. cc. 3 and 58, having suspended the proceedings for penalties, have also virtually taken away, or at least suspended, the right to set up this defence. Or, if not, still there is nothing in the statute of Anne to make it illegal to pay the bet. ROLFE, B., in *Daintree v. Hutchinson*, 10 M. & W. 100, observes that there is a clear distinction pointed out by the fifth section of the 9 Ann. c. 14 "between

(a) Reference was also made to the evidence given by Patteson, J., on the 4th of March, 1844, before a select committee of the House of Commons on the laws relating to gaming. See the Report, pp. 48, 49. Et vide *anté*, 482.

fraudulent play and playing to the amount of 10*l*." Here, the betting is neither deceitful nor excessive. In *Cannan v. Bryce*, 3 B. & Ald. 184, ABBOTT, C. J., referring to the stock-jobbing act, 7 G. 2, c. 8, s. 5, says: "The act of paying or receiving is prohibited absolutely, and those who pay, and those who receive, are both placed in *pari delicto*. And this statute differs from the statute against gaming, 9 Ann. c. 14; for, the latter contains no prohibition against the payment of money lost at play; though it enables the loser to recover back his money within a limited time, and, in default of suit by him, enables any person to recover the money and treble the value, within a further limited time." This point *998] was not decided in *Shillito v. Theed*, 7 Bingh. 405, 5 M. & P. 303.

The objection as to circuity of action can hardly arise here; for, the plaintiff is suing, not for the money won, but to recover damages against the defendant for his breach of contract.^(a) In Chitty's Statutes, p. 422, n., is the following note of a case upon the statute of Anne, which seems quite decisive:—"Trover for a mare lost upon a gaming contract (the action being commenced after three months.) It was ruled that the plaintiff was not entitled to recover, on account of the general invalidity of the contract; and, by HEATH, J.: There is no substantive clause in the act which avoids the contract; it only renders it liable to be defeated *sub modo*, for which purpose the plaintiff must bring his action in a limited time."

Channell, Serjt., contra. If the view taken by the court of Exchequer in *Applegarth v. Colley* be correct, this demurrer cannot be supported. Whatever doubt may have existed upon the authorities prior to the statute 5 & 6 W. 4, c. 41, none can be entertained now. It is true that the statute of Anne, in general terms, avoids the contract, and that the repeal of that provision by the 5 & 6 W. 4, c. 41, is in terms less general. But no case has gone the length of holding that a bet under 10*l*. is *legal*. The second section of the 9 Ann. c. 14, is clearly not repealed by the 7 & 8 Vict. cc. 3 and 58. It would be very singular to hold that the defendant is bound to pay, and yet may recover back the money. In *Franklin v. Carter*, antè, p. 750, the court repudiated the distinction between a payment out of court and a payment in an action. In *Cannan v. Bryce*, ABBOTT, C. J., does not notice the fact that the stock-jobbing *999] act contains a positive prohibition, and that the "statute of Anne does not. [CRESSWELL, J. The foundation of the judgment there is, that the defendant was a party to a breach of the law.] The eighth section of the 18 G. 2, c. 34, enacts, that, if any person shall win or lose at play, or by betting, at any one time, the sum or value of 10*l*. or within the space of twenty-four hours the sum or value of 20*l*., such person shall be liable to be indicted, and shall forfeit five times the value of the sum so won or lost. And that provision,—which is unrepealed,—is to be construed as being in *pari materia* with the 9 Ann. c. 14.

(a) Vide antè, 858, 870, n. (c).

Byles, Serjt., in reply, submitted that the 18 G. 2, c. 34, s. 8, supposing it to be unrepealed, did not apply to horse-racing, or to bets made on horse-races.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

This was an action brought for the purpose of recovering a sum of 10*l.* won by betting upon a legal horse-race; and the pleadings were properly framed to raise the question whether such a bet is recoverable in a court of law.

In the course of the argument, much discussion arose respecting the case of *Applegarth v. Colley*, 10 M. & W. 729, in which it was stated that all contracts for the payment of money won at play, however small the amount, were void by virtue of the statute 9 Ann. c. 14. We do not mean to express any opinion, or to intimate any doubt, in reference to that case; but we do not think it necessary for the decision of the present case that we should enter into a discussion of the law there laid down as applicable to bets under 10*l.*, the action in the present instance being brought for the sum of 10*l.*, and so falling clearly within [*1000 the second section of the statute 9 Ann. c. 14; and, looking at the provisions of that section, we are of opinion that the present action cannot be maintained.

By that section it is provided, in substance, that any person who shall at any time, by betting on the sides of such as play at any of the games aforesaid, (among which horse-racing is held to be included,) lose to any person so playing or betting, the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, the person so losing and paying or delivering shall be at liberty, within three calendar months then next, to sue for and recover the money or goods so lost or delivered, or any part thereof, from the winner thereof: and it is further provided, that, if the loser shall not sue for the money or other thing lost and paid or delivered, within the time aforesaid, it shall be lawful for any person to sue for and recover the same, and treble the value thereof, one moiety to his own use, and the other moiety to the use of the parish.

Now, it appears to us to follow from the provision that the party losing shall be entitled to recover back the money, if he pays it *voluntarily*, that no action can be maintained against him for *refusing* to pay it. It is clearly the intention of the act that the loser should not ultimately lose, nor the winner ultimately win, the money, if the loser chose to enforce the rights given him by the act. And it cannot be supposed that any thing so unreasonable should be intended, as that the loser, in order to avail himself of the benefit of the act, should first pay the money, and then recover it back. It is much more reasonable to hold that the intention of the act was, that he should not be compelled to pay at all, and that no action will lie to compel him to do so. The law, which is said to: abhor circuity of action, is [*1001 surely not so absurd as to allow

the winner to maintain an action to recover money which he may be immediately compelled, by another action, to render back.

It was, indeed, contended by my brother *Byles*, that the argument against circuity of action does not properly apply; for, that the plaintiff has brought his action, not for the purpose of recovering the money he has won, but to recover damages against the defendant for the breach of his agreement to pay the money. This argument, which appears to us to savour rather too much of subtlety, cannot, we think, avail the plaintiff; for, the only substantial question in the cause is, whether the plaintiff is entitled to the money—the question of damages is dependent on the right to the money: and, if the defendant is not bound to perform his contract, no action can lie against him to recover damages for not performing it. (a)

My brother *Byles* further cited a case thus reported in a note in page 422 of Chitty's edition of the statutes: "Trover for a mare lost upon a gaming contract, (the action being commenced after three months.) It was ruled that the plaintiff was not entitled to recover on account of the general invalidity of the contract; and, by HEATH, Justice: There is no substantive clause in the act which avoids the contract; it only renders it liable to be defeated *sub modo*, for which purpose the plaintiff must bring his action in a limited time." That case, however, is quite distinguishable from the present. The question there appears to have been, whether a person who had *voluntarily* paid a bet, could bring his action to recover it back after the expiration of three months: the question here is, whether he can be *compelled* to pay it. Our decision in the present *1002] case, therefore, is by no means at variance with the decision of Mr. Justice HEATH.

But a further argument was urged, arising out of the statutes 7 & 8 Vict. cc. 3 and 58. It was contended that the action given by the second section of the 9 Ann. c. 14, to the loser, to recover back the money he has lost, is an action to recover a pecuniary forfeiture or penalty, within the meaning of the statutes 7 & 8 Vict. cc. 3 and 58; that, by the operation of those statutes, the right which the loser has to sue for it is suspended; and that, consequently, that right could not be set up by way of answer to the plaintiff's claim to maintain his present action.

By the former of the two acts referred to, it is enacted, in substance, that it shall be lawful for any person against whom any writ, &c., shall have been sued out at the suit of any common informer, or person other than the actual loser, for the recovery of any forfeiture or pecuniary penalty incurred under the provisions of the acts there referred to, (amongst others, the 9 Ann. c. 14,) by playing at the games in the schedule mentioned, or by betting on the sides of such as do play, to apply to the court or a judge to stay the proceedings for three months, and until the end of the session of parliament; and which order the court or

(a) Vide *Cocking v. Ward*, ante, 858.

judge is required to make. By the latter act—after reciting the former act, and that it is expedient, that, as well all the proceedings which were stayed or suspended, or authorized to be stayed or suspended, by the operation of the former act, should be stayed or suspended for a further period, and that no other proceedings of a like nature should be commenced or proceeded with during such further period—it is enacted, that all the actions which shall have been brought for the recovery of any forfeiture or pecuniary penalty incurred, or supposed to have been *incurred, under the provisions of the several acts recited in the said recited act, by playing or betting on the sides of such as do play thereat—whether any order of any court or judge shall have been made therein or not—shall be, and the same are thereby, stayed and suspended until the end of the next session of parliament; and that no action, suit, or other proceeding shall be brought for the purpose of recovering any forfeiture or pecuniary penalty incurred, or supposed to be incurred, under the provisions of the several acts, by playing, or betting on the sides of such as do play, previously to the end of the next session of parliament. [*1003]

It is clear that the statute of 7 & 8 Vict. c. 3, has not the effect of suspending the right of the loser of a bet to recover back the amount paid, there being an express exception of such persons; and, considering that the two acts are made *in pari materia*, and that the preamble of the act 7 & 8 Vict. c. 58, refers only to proceedings which might have been stayed under the operation of the 7 & 8 Vict. c. 3, and to other proceedings of a like nature—we think the 7 & 8 Vict. c. 58, was not intended to suspend the right to sue, except for the recovery of any pecuniary penalty or forfeiture of a like nature with those the recovery whereof was stayed by the 7 & 8 Vict. c. 3, namely, penalties to be recovered by persons other than the losers.

But, if this were doubtful, and even though it should be held that the particular remedy given by the statute of Anne to the loser, is temporarily suspended by the operation of the act of 7 & 8 Vict. c. 58, it will not follow that it will have the effect of giving to the winner of a bet a right of action which he did not before possess. The act is a temporary act passed for the purpose of remedying a particular inconvenience; and sufficient effect is given to its provisions, by holding them to apply *to those matters to which they are directly and in terms applicable, without giving them incidentally the effect of altering the existing state of the law in a matter which the framers of the act do not appear to have had at all in their contemplation. [*1004]

We think, therefore, on the grounds above stated, that there should be judgment for the defendant. Judgment for the defendant

END OF TRINITY VACATION.

MEMORANDA.

In Hilary term last, Mr. Baron GURNEY retired from the court of Exchequer, and was succeeded by *Thomas Joshua Platt, Esq.*, one of her majesty's counsel, who, on taking the coif, gave rings with the motto "*Labor et Fides.*" Mr. Baron PLATT shortly afterwards received the honour of knighthood.

In the vacation after Hilary term, Mr. Serjt. *Manning*, and Mr. Serjt. *Channell*, received patents of precedence; the former to take rank next after *James Parker, Esq.*, one of her majesty's counsel; and the latter to take rank next after Mr. Serjt. *Manning*.

In the course of the same vacation, *William Lee, Esq.*, of the Inner Temple, *Lebbeus Charles Humfrey, Esq.*, of Lincoln's Inn, *John Billingsley Parry, Esq.*, of Lincoln's Inn, *William Page Wood, Esq.*, of Lincoln's Inn, *Russell Gurney, Esq.*, of the Inner Temple, *George Medd Butt, Esq.*, of the Inner Temple, and *Abraham Hayward, Esq.*, of the Inner Temple, were respectively appointed her majesty's counsel learned in the law.

AN

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TO

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CONTAINED IN THIS VOLUME.

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ACCEPTANCE.

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ACCOUNT STATED.

See **L. O. U.**

Although an agreement respecting the transfer of an interest in land, required by the statute of frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the price, notwithstanding that the transfer has been effected and nothing remains to be done but to pay,—it was held, that, where, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered under a count upon an account stated. *Cocking v. Ward.* Page 858.

ACKNOWLEDGMENT BY MARRIED WOMAN.

Under 3 & 4 W. 4, c. 74, s. 83.

The court allowed a commission for taking the acknowledgment of a deed by a married woman at Sydney, in New South Wales, to go out with a blank left for her Christian name. *In re the Wife of George Apperton.* 447

ACTION UPON THE CASE.

See **CASE.**

ADMINISTRATOR.

See **EXECUTORS.**

PARTNERED TITLE.

ADMISSIONS.

Under the Rule of Hilary Term, 4 W. 4, r. 20.

In an action on a bill of exchange alleged to have been accepted by the defendants under the style and firm of A. & Co., an order was made, by consent, to admit the handwriting of the acceptance.

The notice to admit was as follows:—

“Bill of exchange for 131l. 10s. drawn by the plaintiff, upon and directed to the defendants as A. & Co., and accepted by B. for

the defendants as A. & Co., payable, &c., and endorsed, &c.:”

Held, that this admission precluded the defendants from denying the authority of B. to bind the firm of A. & Co. by such acceptance, and was not a mere admission that he signed an acceptance purporting to bind that firm. *Wilkes v. Hopkins.* Page 737

AFFIDAVIT.

Form of Jurat.

A jurat stating the affidavit to have been “sworn at the judges’ chambers, Serjeants Inn, Chancery Lane, in the county of Middlesex,” is sufficient. *Hemsworth v. Brian.* 131

And see **JURY.**

NEW TRIAL.

AGENT.

Contract of sale by, p. 232, n. (a).

AGREEMENT.

See **LANDLORD AND TENANT, I.**

PLEADING, I. VI.

L. For Interest in Land.

1. A count in assumpsit stated that A., the plaintiff, was the occupier of a farm, as tenant to Z.; that B., the defendant, was desirous of renting the farm from Z., and had applied to and requested A. to surrender, and relinquish possession thereof, to Z., and to endeavour to prevail upon Z. to accept of such surrender, and to accept B. as tenant in lieu of A.; and that, in consideration that A. would surrender, and relinquish possession of the farm to Z., and would also apply to Z. and endeavour to prevail upon him to accept of such surrender, and to accept B. as tenant in lieu of A., B. promised to pay A. 100l. when he B. should become such tenant. It then averred that A. did surrender, &c., and did apply to, and endeavour to prevail upon, Z. to accept of such surrender, and to accept B. as tenant

in lieu of A.; and that Z. accepted the surrender, and accepted B. as tenant; but that B. refused to pay the 100*l*. :—

Held, that this was a contract for an interest in or concerning lands; and therefore that such special count could only be proved by a note or memorandum in writing, in conformity with the fourth section of the statute of frauds. *Cocking v. Ward*.

Page 858

2. But, *held*, that A. was entitled to recover the 100*l*. upon a count on an account stated, upon proof that B. had, after he obtained possession of the farm, acknowledged his liability and promised to pay that sum.

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ALIENATION BY MARRIED WOMAN.

Under 3 & 4 W. 4, c. 74, s. 91.

The concurrence of the husband in a conveyance by his wife of her separate property, under the above enactment, will be dispensed with, where the parties are living apart by mutual consent, and the husband refuses to join unless part of the purchase-money is paid to him. *In re Sarah Woodcock*. 437

AMENDMENT.

I. Of Award.

See ARBITRAMENT, II.

II. Of Postea.

1. In assumpsit on a memorandum of charter, the declaration contained a special count, and also an indebitatus count for demurrage. The jury having found for the plaintiffs with 170*l*. damages, the plaintiffs, after repeated discussions before the judge who tried the cause, elected to enter up the verdict on the first count. The defendant brought a writ of error, and the court of Exchequer Chamber reversed the judgment, on the ground that no sufficient consideration was disclosed in the first count. Two years after the reversal, the plaintiffs applied to this court for leave to amend the postea by entering the verdict on the fourth count instead of the first, (contending that the evidence was equally applicable to both,) and to make the judgment-roll conformable to the amended postea :—*Held*, that the application was too late. *Jackson v. Galloway*.

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2. *Quære*, whether this court had power to make such amendment after judgment in the court of error. *Ibid*.

ANNUITY.

I. Construction of Annuity Acts.

1. Debt on a bond in the penal sum of 4000*l*., the condition of which bond—after reciting that the obligor was indebted to the obligee in the sum of 2000*l*., and that the latter had agreed to accept and take from the former,

interest for the same at the rate of 5*l*. per cent. per annum, payable half-yearly, during the joint lives of the obligee and his wife, in full satisfaction and discharge of the debt, provided the same were regularly paid,—was declared to be, that, if the obligor should pay the interest in the manner stipulated, the obligation should be void; but, in case of failure in payment of all or any part of the interest, for twenty-eight days next after each payment should become due, the same having been demanded, the bond was to remain in full force. The condition further stated that it was agreed, that, in case of failure in making the several payments aforesaid, within the respective times aforesaid, the bond, or any payments made under the same, should not be construed or taken as a discharge of the debt of 2000*l*., or any part thereof, but the same should forthwith, after such default, become due and payable to the obligee, his executors, &c.

Held—on demurrer to a plea alleging that the annual sum in the condition mentioned was granted for a pecuniary consideration, and that no memorial was enrolled pursuant to 53 G. 3, c. 141,—that this was not a grant of an annuity within the statute. *Marriage v. Marriage*. Page 761

2. Whether provisions of annuity acts apply to annuities granted in consideration of forbearance of pre-existing debts—*quære*. *Ibid*.

II. Form of Memorial.

1. In the memorial of an annuity, part of the consideration was stated to have been paid by "a draft of even date with the indenture, drawn by the grantee on A. B. & Co.," not saying when the draft was payable :—*Held*, that the memorial was insufficient. *Abbott v. Douglas*. 463
2. The court, in such cases, only deal with the judgment signed upon the warrant of attorney, and do not interfere with the other securities. *Ibid*.

APPEARANCE.

See PRACTICE, I.

ARBITRAMENT.

I. Revocation of Submission.

1. Bankruptcy is no revocation of a submission to arbitration. *Hemsworth v. Erien*. 131

II. Amendment of Award.

2. An arbitrator, to whom an award is sent back to be amended, is not bound to give the parties notice to attend him thereon. *Hovett v. Clements*. *Clements v. Hovett*. 123

III. Setting aside Award.

3. It is no excuse for not applying within the proper time to set aside an award, that the party had been prevented from obtaining a knowledge of its contents by the arbitrator

making an extortionate demand for his fees.
Moore v. Darley. Page 445

6. By a judge's order, a cause was referred to A., B., and C., the award to be made by them or any two of them; and it was provided that the arbitrators, or any two of them, should, as to certain work, adopt the opinion or decision of C., and, as to certain other work, the opinion or decision of A. and B., or, in case A. and B. should differ in opinion, then that the arbitrators, or such two of them as should make an award, should adopt the opinion or decision, as to such last-mentioned work, of an umpire, to be nominated by A. and B. before proceeding with the reference. A. and B. appointed an umpire, and afterwards made an award, in which they recited that they had heard and duly considered the allegations and evidence of the parties, and had considered the decision of the said umpire. There had, in fact, been no difference of opinion on the part of A. and B., and no opinion or decision had been required of, or given by, the umpire:—

Held, that the introduction of these words did not vitiate the award. *Harlow v. Read.*

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IV. Attachment for Non-performance of Award.

6. An award directed that the plaintiff should, on a given day, deliver up to the defendant a warrant for a hogshead of port wine lying at the London Docks, describing it by its number and marks: the demand required the plaintiff to deliver up "one hogshead of port wine," describing it:—*Held*, that this was not a sufficient demand to support an attachment. *Hemsworth v. Brian.* 131

V. Costs.

6. A cause and all matters in difference were referred to a lay arbitrator, the costs of the cause, reference, and award to abide the result of the award. The arbitrator awarded that the plaintiff had no cause of action as to the first count; and that, as to the second, third, and fourth counts, the defendant was indebted to the plaintiff in £8l. 9s. 7d.; but that the plaintiff was indebted to the defendant upon the whole matters referred (including the above sum) in 17l. 7s. 5d.:—*Held*, that he was not bound to give any direction as to costs. *Hemsworth v. Brian.* 131

ARGUMENTATIVENESS.

See PLEADING, III.

ASSAULT.

See PLEADING, V.

ASSIGNEE.

See BANKRUPT.

ATTACHMENT.

For Non-performance of Award.

See ARBITRAMENT, IV.

AWARD.

See ARBITRAMENT.

BAILMENT.

1. A bailee of goods for hire, by selling them, determines the bailment. *Cooper v. Willomatt.* Page 673
2. And the bailor may maintain trover against the purchaser, though the purchase was *bona fide.* *Ibid.*
3. A. conveyed goods by bill of sale to B. B. allowed A. to use the goods at a weekly rent, A. undertaking to deliver them up on demand. A. afterwards sold and delivered the goods to C., a *bona fide* purchaser:—*Held*, that B. might maintain trover against C. *Ibid.*

BANKING COMPANY.

List of Proprietors.

In a *sci. fa.* against A. and B. as proprietors, on a judgment against a public officer of a banking company, under 7 G. 4, c. 46:—*Held*, that lists of the proprietors filed at the stamp-office, but not within the time limited by the act, were not receivable in evidence as against the plaintiff, to show that at a given time A. and B. were not proprietors. *Prescott v. Buffery.* 41

BANKRUPT.

I. Notice of Act of Bankruptcy.

1. *Quare*, whether a general notice that a party has committed an act of bankruptcy, is a notice of an act of bankruptcy within the meaning of the statute 2 & 3 Vict. c. 29. *Conway v. Nall.* 643
2. A notice to the following effect:—"J. S. has committed an act of bankruptcy. He signed a declaration of insolvency yesterday. J. S. will be declared bankrupt immediately. I have sent for a fiat"—is not such a notice as will deprive an execution-creditor of the protection of the 2 & 3 Vict. c. 29; the sixth section of the 6 G. 4, c. 16, requiring the declaration of insolvency to be filed, and to be advertised in the London Gazette, before it is a complete act of bankruptcy. *Ibid.*

II. Set-off of Mutual Debts.

3. Assumpsit by the assignees of A., for money received to the use of the plaintiffs, as assignees.

Plea, that, before the defendant had notice of any act of bankruptcy committed by A., and before any fiat against A., the defendant gave credit to A. in the sum of 148l. 10s., by

accepting, for his accommodation, and at his request, and without any consideration, a bill for that sum, which bill A., before notice to the defendant of A.'s bankruptcy, endorsed and negotiated for value for his own use and benefit; that the *credit* so given by the defendant to A. was a credit of a nature extremely likely to end in a debt from the said A. to the defendant; that afterwards the defendant was obliged to pay the bill to the holders, and thereupon and thereby the said A. became and was indebted to the defendant in the sum of 148*l.* 10*s.*; that, before the defendant had notice of any act of bankruptcy, and before any fiat against A., A. delivered to the defendant bills of exchange for 100*l.* and 20*l.*, for the purpose and in order that the defendant might receive the amounts thereof for the use of A.; that the defendant afterwards received such amounts, and was ready and willing to set-off the one debt against the other:

Held, that the acceptance for the accommodation of A. was a *credit* given to A., and that the delivery of the two bills by A. to the defendant for the purpose in the plea mentioned, was a *credit* given by A. to the defendant. *Bittleston v. Timmis*. Page 389

4. *Held*, also, that such mutual credits might be set off under the 6 G. 4, c. 16, s. 50.

Ibid.

5. *Held*, also, that the defendant's set-off was well pleaded in confession and avoidance.

Ibid.

BARON AND FEME.

I. *Alienation by Feme*.—See ALIENATION.

II. *Case for False Representation by*.—See CASE, III.

BET.

See HORSE-RACING.

BILLS AND NOTES.

I. Acceptance.

1. A., in Genoa, shipped corn to B., in London, and with B.'s authority drew bills upon C., in Southampton, with whom B. had an account. On the 10th of August, 1843, B. wrote to C. that A. had drawn the bills, and requesting C. to accept them to the debit of his account. On the 11th C. wrote to B., acknowledging the receipt of a bill for 3560*l.* to the credit of his account, and concluding, "against this remittance we send you, as requested, the bill of lading of Flora, and will accept A.'s drafts," the bills in question. This letter was received by B., in London, on the 12th; and on the same day C. saw B. in London, and informed him that the bills would not be accepted and that the consent given in the letter of the 11th was countermanded. On the 13th B. communicated to A. the promise to accept, but withheld the fact of the countermand:—

Held, that the letter of the 11th of August operated as an acceptance, and entered for the benefit of A., and that B. could not afterwards cancel that acceptance, or release the defendants from their engagement, by assenting to the subsequent countermand. *Grant v. Hunt*. Page 44

2. *Quere*, whether it is essential that a promise to accept or pay (not on the face of the bill) should be communicated to some party to the bill, or to the holder, or to some agent for such party or holder, in order to bind the person making it. *Ibid.*

II. Notice of Dishonour.

3. A., in London, to whose care a bill, bearing the endorsement of B., at Bruges, had been referred, "in case of need," paid it *supra* protest, for B.'s honour, and immediately gave B. notice, and sent the bill to him. B. endorsed the bill to A., and returned it to him by the next post, and A. on the same day gave notice of dishonour to the drawer: *Held*, that the notice was in time. *Goodell v. Polhill*. 233

III. Failure of Consideration.

4. In April and July, 1843, B. purchased of A. a certain material called oropholithe, of which A. was the patentee. The portion purchased in April was described in the invoice as "roofing," and was put on a building belonging to B. by A.'s workmen. That supplied in July was described as "material," and was put on by B.'s workmen. There had been a previous purchase in October, 1842, which had been described as "flooring," and was so applied, and as to which money was paid into court. In an action upon a bill of exchange given by B. in payment of the above goods, B. pleaded that he accepted the bill in consideration of goods called oropholithe, which A. had warranted "fit for the roofing of buildings," but which proved to be useless. At the trial B. proved, that, in September, 1843, his agent had a conversation with A.'s agent about roofing certain premises he was building with the patent article; on which occasion the latter gave the former a prospectus, which described it as fit for external roofing. The judge ruled that there was no evidence to be left to the jury in support of the plea:—*Held*, that the direction was right, inasmuch as it was not shown that the contract for the goods subsequently supplied was made with reference to the treaty for roofing, in September, 1842, or, that the "material" sold in July, 1843, was sold for roofing rather than flooring; and that the plea failing as to part, failed altogether. *Camac v. Warrior*. 368

And see ESTOPPEL.

PLEADING, VII.

BILL OF SALE.

See BAILMENT.
TROVER.

BOND.

I. Plea of Performance.

1. Debt on bond conditioned for the payment of a sum of money and interest on a given day, and for the performance of covenants in an indenture. Plea, performance generally. Replication, that the obligors did not pay the money in the condition mentioned, *modo et formá*, concluding to the country:—

Held, that the replication was proper, as taking issue on the payment impliedly alleged in the plea. *Roakes v. Manser*.

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2. *Held*, also, that the plea was bad. *Ibid*.

II. Breaches.

1. Assignment of breaches, p. 543, n. (b).

2. Remedy of obligee on, p. 249, n. (c).

CASE.

I. Nuisance on public Highway.

1. B., the owner and occupier of premises adjoining the highway, employed C. to make a drain therefrom, to communicate with the common-sewer. In the performance of this work, the workmen employed by C. placed gravel on the highway; in consequence of which A., in driving along the road, sustained personal injury. Before the accident the dangerous position of the heap was pointed out to B., who promised to remove it. C. had the sole management of the work, and employed and paid D. to cart away part of the rubbish, at a certain price per load, and had charged A. in his bill with the sum so paid:—

Held, that B. was liable to A., in case. *Burgess v. Gray*. 578

II. Private Nuisance.

2. A declaration in case stated that the defendant, being possessed of a messuage adjoining a garden of the plaintiff, erected a cornice upon his messuage, projecting over the garden, by means whereof rain-water flowed from the cornice into the garden, and damaged the same, and the plaintiff had been incommoded in the possession and enjoyment of his garden:—

Held, that the erection of the cornice was a nuisance from which the law would infer injury to the plaintiff; and that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice and the commencement of the action. *Fay v. Prentice*. 828

3. *Held*, also, that the declaration was not to be construed as alleging a trespass. *Fay v. Prentice*. Page 828

III. For false Representation.

4. In case against husband and wife for falsely representing to the plaintiff, a broker employed by them to distrain upon certain premises in which the wife had an interest, that the latter was entitled to distrain for rent in arrear, whereby the plaintiff, who made the distress, was put to costs in a replevin suit—it appeared that a distress warrant was signed by the wife and handed to the plaintiff in the presence of the husband; that no representation whatever was made by the defendants or either of them at the time the warrant was so handed over; but that, in fact, the wife had no right to sign a warrant, the legal estate being in trustees:—*Held*, that it was properly left to the jury to say whether there was any false or fraudulent representation in the mere omission to state that the property was in settlement, when the plaintiff was employed to distrain; and, the jury having found there was not, that the plaintiff was not entitled to recover on not guilty, it being essential to the maintenance of the action that the falsehood of the representation should have been known to the party making it. *Rawlings v. Bell*.

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CHARTER-PARTY.

See SALE.

CHILDREN.

See DEVISE, 2.

COMMISSION.

To examine Witnesses upon Interrogatories.

An order for a joint commission to examine witnesses in Ireland, besides the usual provision for the delivery of interrogatories and cross-interrogatories by each party to the other, empowered the commissioners to put, or cause to be put, additional questions when it should appear to them to be necessary and proper:—*Held*, that this power was not well exercised by the commissioners allowing the agent for one of the parties to put additional questions, subject to the objection raised by the other party. *Williamson v. Page*. 464

CONTRACT.

Construction of, p. 232, n. (b).

And see MISDIRECTION, 1.
SALE.

CONTRIBUTION.

See MONEY PAID

CONVICTION.

Form of.

See TURNPIKE ACTS, 2.

COPYRIGHT.

I. Of Books.

1. In case for infringement of copyright of a book entitled "*Evening Devotions, &c.*," from the German of C. C. Sturm, the defendants pleaded, that Sturm had written religious works in the German language, which had been translated into English, and were much valued; that the plaintiff employed one H. to write the book mentioned in the declaration, and, with intent to defraud and deceive the public, and to make them believe that the book was a translation of an original book written by Sturm, fraudulently published it as and for a translation of an original work written in German by Sturm; and that he published with the book a false and fraudulent preface, the object of which was to induce the public to believe that it was really a translation of a work written by Sturm:—*Held*, that the plea disclosed sufficient to negative the existence of a valid copyright in the plaintiff, and to preclude him from maintaining an action for piracy. *Wright v. Tallis*. Page 893

II. Of Designs, under 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65.

2. *Quære*, whether a mechanical contrivance within the stem of a parasol, for raising or lowering it with one hand, is "a design for the shape or configuration of an article of manufacture," within the 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65. *Miltingen v. Pickers*. 799

- 3 By articles of agreement between A. and B., after reciting that A. had invented a parasol upon a new principle, it was agreed that B. should be permitted to manufacture it; and that, if B. should, pending the agreement, manufacture parasols without making the stipulated payments, or do any thing whatever to prejudice A.'s right and title to the invention, he should pay A. 100*l.* as liquidated damages.

In case for a breach of this agreement, the declaration alleged that A. was the proprietor of a new or original design for an article of manufacture, having reference to a purpose of utility, so far as the design was and is for the shape or configuration of such article, that is to say, of a new or original design for the shape or configuration of a parasol, for the purpose of opening and closing the same with one hand, and which design had not before or at the time of registration been published; that such design was duly registered according to the 6 & 7 Vict. c. 65; and that B. published a circular stating A.'s design to be an infringement of a patent previously granted to C.

B. pleaded, that A. was not, before or at the time of the registration, the inventor or

proprietor of a new or original design for the shape or configuration of a parasol, not published before or at the time of the said registration, *modo et formâ*:—

Held, that this plea did not raise the question, whether or not the alleged invention of A. was the proper subject of a certificate of registration under the statutes 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65. *Miltingen v. Pickers*. Page 789

COSTS.

I. General Costs in the Cause.

1. In trespass and false imprisonment by A. against B. and C., each of the defendants pleaded separately, not guilty, and a justification under a judgment and *ca. sa.* against A., at B.'s suit: to this last plea A. replied, that he was in his dwelling-house, the outer door thereof being closed and fastened, and that B. and C. unlawfully and with force and arms and with a strong hand, forced and broke open the said outer door, and so entered for the purpose of arresting, and did arrest, him under colour of the writ. B. rejoined, that he did not force or break open the said outer door, &c.: the jury having found for B. on the first issue, and for A. on the second, and for A. against C. on both issues:—*Held*, that the right of B. to the general costs of the cause was not affected by the finding on the second issue against him. *Newton v. Holford*. 141

II. Where damages under 40*s.*

2. In an action for a libel, the defendants pleaded not guilty and several pleas of justification: the plaintiff recovered a verdict upon all the issues, *damages three farthings*: *Held*, that, by virtue of the 3 & 4 Vict. c. 24, s. 2, he was not entitled to any costs. *Newton v. Rowe*. 187

III. Security for.

3. *Who entitled to.*—A claimant who is substituted for the defendant under an interpleader rule, is entitled to call upon a foreign plaintiff for security for costs. *Benazzah v. Bennett*. 313
4. *When to be moved for.*—A motion for security for costs may be made, notwithstanding the defendant is under terms to take short notice of trial, or such notice as the plaintiff can give, provided issue be not joined. *West v. Cooks*. 313

COVENANT.

I. Construction of.

1. In trespass for breaking and entering a farm, the plea,—after setting out a lease by indenture from A. to the plaintiff, which contained covenants by the plaintiff that he would not, during the term, sow, reap, or take from the arable lands demised, more than two

crops of any sort of corn or grain successively, but would every third year summer-fallow or lay the said arable lands down with rye-grass and clover seeds, or would plant with potatoes, or sow with peas or beans, which should be twice well hoed; and also that the plaintiff would not during the term, let, assign, or set over, or otherwise part with, the indenture of lease, or the premises thereby demised, without the special license and consent of A., his heirs, and assigns, in writing, (with a power of re-entry for breach of any covenant in the lease,) and setting out a grant by indenture of the reversion to the defendant,—stated, that, after the making of those indentures, &c., the plaintiff did set over and part with the said indenture of lease, within the true intent and meaning of the said indenture, and the proviso and condition for re-entry therein contained, to wit, by pawning, pledging, and mortgaging the said indenture of lease to and with certain creditors, to wit, B. and C., without the consent of A. or of the defendant. The plaintiff replied, that he did not set over or part with the said indenture of lease, within the true intent and meaning of the said indenture of lease, &c., by pawning, pledging, or mortgaging the said indenture with the said supposed creditors, *modo et forma* :—

Held, had on special demurrer; for, that the replication should have denied, generally, that the plaintiff had parted with, i. e. in any manner parted with, the indenture, instead of confining the issue to the particular mode of parting with it, immaterially stated under a *scire facit*, in the plea. *Hammond v. Calk.* Page 916

And see DISTINGUISH.

5. Another plea stated, that, during the term, the plaintiff sowed and took off and from fifty acres of the arable lands demised, more than two crops of corn successively; and that he did not nor would every third year summer-fallow or lay the said arable lands or any part thereof down with rye-grass, &c., nor did nor would plant with potatoes, nor sow with peas, which were twice hoed, &c. The plaintiff replied,—that he *did not* at any time during the term, sow or take off or from the arable lands, or any part thereof, more than two crops of any sort of grain successively—and in every third year *did* summer-fallow a part, consisting of fifty acres, and *did* lay down with rye-grass, &c., part, consisting of, &c., and *did* plant another part, consisting of, &c., with potatoes, and *did* sow another part, consisting of, &c., with peas, and the residue of the arable land with beans, which were twice well hoed, &c.: and that there was not, at any time

during the demise, any portion of the arable lands in the indenture contained which the plaintiff did not every third year either summer-fallow or lay down with rye-grass, &c., or plant with potatoes, or sow with peas or beans which were twice well hoed; contrary to the covenant, &c.; concluding to the country :—

Held, on special demurrer to the replication, that the covenant set out was two-fold—one, that the tenant *would not* take more than two crops of grain in succession—the other, that he *would* do certain things; that the plea correctly averred a breach of the first branch of the covenant, but did not show a breach of the second, inasmuch as it did not negative the sowing with beans; and that the replication, which contained a direct traverse of the breach well alleged in the plea, was not rendered bad by the introduction of the subsequent immaterial matter relating to the other breach. *Hammond v. Calk.* Page 916

II. For quiet Enjoyment.

6. A., being tenant for life, with a leasing power, by indenture bearing date in March, 1805, demised to B. for ninety-nine years, if C., D. and E. so long live: this indenture contained the following clause :—“And A., for himself, his heirs, and assigns, the demised premises, unto B., his executors, &c., under the rent, covenants, conditions, exceptions, and agreements, before expressed, against all persons whatsoever lawfully claiming the same, shall and will, during the said term, warrant and defend.” This lease having, upon the death of A., been held to be void as against the remainderman by the judgment of a court of law, on the ground that it was not made in conformity with the leasing power :—*Held*, that the clause in question operated as an express covenant for quiet enjoyment during the whole term granted by the lease; and consequently that B., or his assigns, and the executors, &c., of such assignee, might recover against the executors of A. the value of the term, the costs of defending an action of ejectment brought by the remainderman, and also the sum recovered by him for mesne profits. *Williams v. Burrell.* 403

III. By Oblige of a Bond, 249, (c).

COUNTERMAND.

Of Acceptance.

See BILLS AND NOTES, I. 1.

CUSTOMARY FREEHOLDS.

The freehold of customary tenements not held at the will of the lord, and transferable by lease and release and admittance, is in the lord: and where, in trespass by the tenant

mary tenant, against the lord, the latter pleads *libertum tenementum*, the derivative and subordinate interest of the tenant ought to be replied. *Thompson v. Hardinge*.

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DAMAGE FEASANT.

1. The owner of the cattle distrained cannot, without tendering amends, pay, under protest, an excessive sum demanded for damage, and recover the amount as money had and received to his use. *Gulliver v. Coerns*. 788
2. If a sufficient tender is made before the distress, the remedy is replevin or trespass; if after the distress, (and before the impounding,) detinue. *Ibid*.

DAMAGES.

I. How assessed.

1. In trespass against several defendants implicated in one joint act of trespass, the damages must be assessed against all jointly, though all may not have been equally culpable. *Eliot v. Allen*. 18

And see p. 29, n. (c); p. 189, n. (a).

II. Excessive.

2. In actions for torts, the court will not interfere with the amount found by the jury, unless grossly disproportioned to the injury sustained. *Williams v. Currie*. 841
3. Where, therefore, a landlord caused considerable injury to the crops of his tenant by selling, felling, and removing timber, without applying for leave to enter, and the jury assessed the damages at £300, the court refused to interfere, although the net value of the entire crops did not exceed £300. *Ibid*.

III. Motion to Increase.

4. Held, that a motion to increase the damages found upon a trial in the vacation, made after the first four days of the term, is too late. *Masters v. Farris*. 715

And see MISDIRECTION.

DE INJURIA.

See PLEADING, XV.

DESIGNS.

Copyright of—See COPYRIGHT, II.

DETINUE.

See DAMAGE FEASANT.

DEVISE.

Construction of.

1. A. devised his copyhold and real estates to B., his heirs, and assigns; but, "in case B.

shall depart this life without leaving any issue of his body lawfully begotten then living, or being no such issue, and B. shall not have disposed and parted with his interest of, in, and to the said copyhold estate," then he devised the same unto and to the use of C., her heirs and assigns:—Held, that the limitation over to C. was valid, and took effect on the death of B. without issue, and without having parted with his interest by surrender or by deed in his lifetime, and that a testamentary disposition by A. was inoperative. *Doe d. Stevenson v. Glover*.

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2. A. devised to B. on trust to permit and suffer his wife C. to receive and take the rents and profits for her own use for the term of her life; and, after her decease, in trust for all and every such one or more of the child or children of C., for such estate and interest as she should, by deed or will, appoint; and, in default of appointment, in trust for all and every the child and children of C., and, if more than one, equally, and to their several and respective heirs; and, in case C. should die without leaving issue as aforesaid, then to the heirs of C. for ever:—Held, that "issue" must be taken to mean "children," and, consequently, that the limitation over was not too remote. *Walker v. Patchell*. 652

But see ADDENDA, 1005 (c).

DISCLAIMER.

See PATENT, VII.

DISCONTINUANCE.

- A rule to discontinue cannot be taken out whilst proceedings are stayed. *Murray v. Silver*. 630

DISTRINGAS.

Affidavit on Motion for.

- Upon a motion for a *distringas*, it is not enough that the affidavit negatives the appearance of the defendant "according to the exigency of the writ" of summons. *McAlpin v. Gregory*. 299

And see COVENANT, I.

DOUBLE VALUE.

See LANDLORD AND TENANT.

EJECTMENT.

I. Service of Declaration and Notice.

1. Where a subsequent acknowledgment by the attorney of the tenant is relied on to aid an insufficient service, the affidavit must distinctly show that he is the attorney in the matter. *Doe d. Reynolds v. Roe*. 711

II. Staying Proceedings, under the 4 G. 2, c. 28, s. 4.

2. In ejectment for non-payment of rent, a sub-lessee is entitled to a stay of proceedings on payment of rent and costs, under 4 G. 2, c. 28, s. 4. *Doe d. Wyatt v. Byron.* Page 623

ENTRY, RIGHT OF.

See p. 719, n. (b).

ESTOPPEL.

See GRANT.

In an action by an endorsee against the acceptor of a bill, which upon the face of it purported to be a foreign bill:—*Held*, that the defendant was not estopped from showing, that, although dated abroad, the bill was in fact drawn in London; although this was done at his express request, and the plaintiff, who took the bill for value, was not cognizant of the circumstances. *Stedman v. Duhamel.* 888

EVICITION.

See PLEADING, III.

EVIDENCE.

See ADMISSIONS.
BANKING COMPANY.
COMMISSION.
PRACTICE, IV.
STAMP.

I. What admissible.

1. In an action for making and fixing iron railing to certain houses belonging to the defendant, the defence was, that the credit was given to A., by whom the houses were built under a contract, and not to the defendant. A., who had become a bankrupt since the railing was furnished, being called as a witness, and having stated that the order was given by him, was asked what was the state of the account between himself and the defendant in reference to the building of the houses at the time of his bankruptcy, to which he replied that the defendant had over-paid him by 350*l.*:—*Held*, that this evidence was properly received. *Gerish v. Chartier.* 13

II. Competency of Witness.

2. In an action against one of two part-owners upon a charter-party made by him alone:—*Held*, that another part-owner, who was no party to the action, and did not authorize the defence, was a competent witness for the defendant. *Atkinson v. Foster.* 712

III. Liability of Witness for Disobedience of a Subpoena—See PLEADING, II. 2.

EXCESSIVE DAMAGES.

See DAMAGES, III.

EXECUTORS AND ADMINISTRATORS.

See PRETENDED TITLE.

A verdict having been found for the defendant, the plaintiff obtained a rule nisi for a new trial; but the defendant having died after the trial, the rule was drawn up calling upon "his legal representatives or their attorneys," to show cause, and it was served upon the latter:—*Held*, that cause might be shown by counsel instructed by the attorneys acting for the executors named in the will, though there had been no probate. *Thomas v. Dunn.* Page 139

EXECUTION.

See MONEY HAD AND RECEIVED.
PRACTICE, VI.
PRISONER.
WARRANT OF ATTORNEY.

FALSE REPRESENTATION.

See CASE, III.

FELONY.

See REWARD.

FORFEITURE.

See EJECTMENT, II.
TURNPIKE ACTS.

FRAUDS, STATUTE OF.

See AGREEMENT.

GAMING.

See HORSE-RACING.
LOTTERY.

GRANT.

A grant of goods not in existence, or not belonging to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein. *Lunn v. Thornton.* 379

GUARANTEE.

Construction of.

1. B. gave to A. the following guarantee: "As you are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you the payment of, any sums of money which C. now is, or may at any time be, indebted to you, so that I am not called upon to pay more than the sum of 2000*l.*" There had been com-

siderable dealings between A. and C. prior to the date of the guarantee, consisting of loans of money, payments made for and goods supplied to C. by A., the credit upon which had not then expired; and those dealings had been, to a small extent, since continued:—*Held*, that the guarantee disclosed a sufficient consideration, for the payment as well of the past as of the future debt. *Johnston v. Nicholls*. Page 251

2. The declaration alleged the existence of prior dealings between A. and C. of the three descriptions above mentioned, and then went on to state, that, in consideration that A. would continue such dealings with C., B. promised A. to be responsible for and to guarantee the payment of any sums of money which C. then was or at any time thereafter might be indebted to A. in the course of such dealings; that is to say, as well in respect of the sums of money so lent and advanced on credit as aforesaid, and of the sums of money so paid, laid out, and expended on credit as aforesaid, and of the goods so sold on credit as aforesaid, and which respective credits were wholly unexpired as aforesaid at the time of the making of the said promise, as also in respect of such dealings so to be continued as aforesaid, so that C. should not be called on to pay more than 2000*l*.—*Held*, that there was no variance, and that the declaration was good. *Ibid*.

HABEAS CORPUS.

See PRISONER.

HORSE-RACING.

See LOTTERY.

1. A bet of 10*l*. on a legal horse-race, is within the prohibition of the 9 Ann. c. 14, and, therefore, not recoverable in a court of law. *Thorpe v. Coleman*. 990
2. And the remedy given by the statute of Anne is not suspended by the operation of the 7 & 8 Vict. cc. 3 and 58. *Ibid*.

HUSBAND AND WIFE.

See BARON AND FEME.

INCOME-TAX ACT.

Plea of Payments under.

To covenant for rent under an indenture, the defendant pleaded, as to 2*l*. 0*s*. 10*d*., that, on the 5th of April, 1843, before any part of the rent became due, 2*l*. 0*s*. 10*d*., being at the rate of 7*d*. for every 20*s*. of the annual value, was duly, and according to the form

of the statute, assessed on the premises, in respect of the property thereof, for the year ensuing; that, on the 20th of August, 1844, before the commencement of the suit, the defendant, then being occupier and tenant, paid to T. C., then being collector, the 2*l*. 0*s*. 10*d*.; and that the defendant had never made any payment on account of the rent since the payment of the 2*l*. 0*s*. 10*d*.—*Held*, on general demurrer, that the plea sufficiently showed that the assessment was made under the property and income-tax act, 5 & 6 Vict. c. 35, and that it answered that part of the demand to which it was pleaded. *Franklin v. Carter*. Page 716

INNUENDO.

See LIBEL.

INSOLVENT DEBTOR.

To an action by an endorsee against the acceptor of a bill, the latter pleaded, that, before the commencement of the suit, a petition for his protection from process was duly, and according to the statute, presented by him to the court of bankruptcy; that afterwards, and before action brought, a final order for protection and distribution was made in the matter of the petition, by J. E., a commissioner of the said court, duly authorized in that behalf; and that the causes of action in the declaration were contracted before the date of filing the petition:—*Held*, a sufficient plea in bar, within the 5 & 6 Vict. c. 116, s. 10. *Cook v. Hanson*. 996

INSURANCE.

Total Loss.

A policy was effected in June, 1843, upon a ship valued at 17,000*l*., at and from China to Madras, and back to China. The vessel was purchased by the plaintiffs in 1839 for 11,000*l*. During the voyage, the vessel was, by a peril insured against, dismasted; and by the wreck of the masts and rigging falling over the ship's sides and striking under her hull, her copper and sheathing were injured. The necessary expenditure to repair the damage so sustained, and to refit, so as to render the ship seaworthy for the voyage, would have amounted to 10,500*l*.; and, if such expenditure had been incurred, the ship would have been worth a sum not exceeding 9000*l*. During the hurricane the ship made no more water than usual; and upon examination at Calcutta, the hull did not appear to be injured, and the ship appeared to be sound in all other respects than those above mentioned:—*Held*, that the underwriters were liable to for a total loss. *Manning v. Irving*. 109

INTEREST.

On judgment. *Manning v. Irving*. 117

INTEREST IN LAND.
See AGREEMENT.

INTERPLEADER RULE.

Security for Costs on.

See COSTS, III.

I. O. U.

1. B., C., D., and E. gave a joint and several promissory note to A. for 200*l.* and interest, as security for a loan to A. On the death of E., B. obtained the note from A. for the purpose of procuring the signature of an additional party; and, to secure its return, B. and C. signed the following document:—"I O Mr. A. 200*l.* for value received." The note was returned by B. to A., with the name of F. added, but the I O U was not given up. The alteration was made with the assent of all parties.

Quere, whether the addition of the fifth name was such a material alteration as to avoid the note? *Gould v. Coombs*. Page 543

2. Assuming it to be so:—*Held*, in an action by A. against B., that, as the note was free from objection at the time the I O U was given, it was admissible in evidence in support of a count upon an account stated.

Ibid.

3. And that, A. assenting to a verdict being entered against him upon the count on the note, he was entitled to a verdict for 200*l.* on the account stated, although the particulars of demand merely alleged that the action was brought to recover the amount of the promissory note.

Ibid.

4. *Held*, also, that the insertion of the words "for value received" did not render the I O U liable to a note, or to an agreement, stamp.

Ibid.

IRREGULARITY.

See PRACTICE, I.

TRESPASS, I.

ISLE OF WIGHT.

See TURNPIKE ACTS.

ISSUE.

See DAVIS, 2.

JOINT-STOCK COMPANY.

See STAMPS, 2.

JUDGES' ORDERS.

See REGULA GENERALIS, I.

JUDGMENT AS IN CASE OF A NON-SUIT.

It is no ground for discharging a rule for judgment as in case of a nonsuit, without a peremptory undertaking, that the plaintiff

has, since the commencement of the action, discovered that the debt is recoverable in a court of requests. *Nicholson v. Jackson*.

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JURAT.

See AFFIDAVIT, I.

JURY.

Affidavits of jurymen as to what passes among themselves with reference to a verdict, are not admissible. *Bentley v. Fleming*. 499

LANDLORD AND TENANT.

I. *Construction of Agreement.*

1. By a memorandum in writing, A. agreed to let to B. a house "at a yearly rent of 50*l.*" with a proviso that A. should, "in consideration of the yearly rent as aforesaid being duly paid," give B. quiet possession of the said house: and B. agreed "to pay the aforesaid rent of 50*l.*, and all taxes," &c. The memorandum then concluded thus:—"likewise the stable and loft over, now occupied by H., at a further rent of 25*l.* per annum,—to be paid on the usual quarter days:—*Held*, by Coltman, Cresswell, and Erie, J., *absente* Tindal, C. J., that the reservation of quarterly payments applied only to the 25*l.* rent, and not to the 50*l.* *Coomber v. Howard*. 449

- II. *Double Value*, under 2 W. & M. sess. 1, c. 5, s. 4.

2. In case upon the 2 W. & M. c. 5, s. 4, for double value, for distraining, no rent being due, the jury ought to be directed, if they find for the plaintiff, to give damages to double the amount of the value of the goods. *Masters v. Farris*. 715

III. *Second Distress.*

3. Trover lies against a landlord who makes a second distress for the same rent, when he might have taken sufficient at first, or where, having taken a sufficient distress at first, he voluntarily abandons it. *Dawson v. Cropp*. 961

4. In trover for household furniture, the defendant pleaded that he took the goods as a distress for rent. Replication, that, after the rent became due, and before the distress in the plea mentioned, the defendant took goods of the plaintiff other than those in the count mentioned, as a distress for the arrears of rent, the said goods being liable to a distress for the said rent, and of sufficient value to satisfy it, and that the defendant could and might have satisfied the arrears, &c., therout, yet that he wrongfully and vexatiously, and without excuse, refused and neglected so to do, &c.

Held, a good answer to the plea; for, assuming the rent to remain due, still the landlord could not under the circumstances take a second distress. *Dawson v. Cropp*.

Page 961

5. Rejoinder—that the goods first seized were not of sufficient value to satisfy the arrears of rent, and that the defendant, before the making of the second distress, lawfully abandoned and put an end to the first, and withdrew from possession, and that the rent so distrained for remained wholly due and unsatisfied. Surrejoinder—that the goods and chattels in the replication mentioned were of sufficient value to satisfy the arrears of rent:—

Held, that, if the rejoinder could be read so as to make the insufficiency of the goods distrained the ground of abandoning the distress, the averment of insufficiency was material, and the surrejoinder traversing it, good; but that, if it could not be so read, the rejoinder was bad, as not showing any lawful ground for relinquishing the first distress, and taking a second. *Ibid*.

LEASE.

See COVENANT, I. II.

LIBEL.

See COSTS, II.

Effect of Innuendo.

A declaration for a libel stated that on a certain night, a gentleman was hounded and robbed in a public-house kept by the plaintiff—*innuendo*, “that a person had been feloniously drugged and robbed in the said public-house, and thereby intending to cause it to be believed that the said public-house was the resort of, and frequented by, felons, thieves, and depraved and bad characters.” The jury having returned a verdict for the defendant, notwithstanding that witnesses called for the plaintiff stated that they had ceased to frequent the plaintiff’s house in consequence of the publication, and that they understood the libel as an imputation upon the plaintiff, and upon the character and conduct of his house—the court refused to grant a rule for a new trial. *Broome v. Gosden*.

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And see p. 732, n. (a).

LIBERUM TENEMENTUM.

See CUSTOMARY FREEHOLD.

LIMITATION.

See DAVIS.

LOTTERY.

See HORSE-RACING.

1. To debt for money had and received, the defendant pleaded, that a certain race was about to be run, and that an illegal game called a lottery, not authorized by law or act

of parliament, was set up by the defendant for certain subscribers of 1*l*. each, (in the whole amounting to 15*l*.) to be paid to the defendant under regulations in substance as follows:—that the subscriber whose name should be drawn out of a box next after the name of the horse, (drawn from another box,) which horse should be placed first in the race, should be entitled to receive from the defendant 100*l*. The plea then alleged that the subscriptions were paid by the plaintiff and others to the defendant, and that the plaintiff, under the regulations, became entitled to the 100*l*.:—*Held*, that the plea disclosed a transaction within the prohibition of the lottery acts 10 & 11 W. 3, c. 17, and 42 G. 3, c. 119. *Alport v. Nutt*. Page 974

2. *Held*, also, that, supposing the transaction to be a bet, it was an illegal bet. *Ibid*.
3. *Held*, also, that the plea was good in form, as setting up illegality of consideration by statute. *Ibid*.
4. In assumpsit for money had and received, a plea that the money was the amount of a prize in an illegal lottery held by the defendant, and that he paid over the amount to J. S., whom he conceived to be the winner, and who was entitled to receive and to retain the money, is bad for duplicity. *Home v. Lock*. 534

MANOR.

See CUSTOMARY FREEHOLD.

MARRIAGE.

See POWER.

MATERIAL EVIDENCE

See PRACTICE, IV.

MEMORANDA, 1004.

MESNE PROFITS.

See COVENANT, II.

MISDEMEANOR.

See PRISONER.

MISDIRECTION.

See BILLS AND NOTES, III.

1. The plaintiffs declared in assumpsit upon a contract, by which they were to manufacture and fix for the defendant a certain copper, &c., necessary for the fitting up of a brew-house, according to a specification, for a certain price, and the defendant was to permit the plaintiffs to put up the work, and pay for the same on the delivery and fixing up thereof; assigning as a breach that the defendant would not permit the plaintiffs further to proceed with, and to complete the work, but discharged them therefrom. Upon the trial of an issue on the readiness of the plaintiffs to manufacture and complete the

pepper, &c., it was left to the jury to say, upon the evidence, which party was in fault in occasioning the contract not to be carried into effect:—*Held*, no misdirection. *Pontifex v. Wilkinson*. Page 75

2. On showing cause against a rule for a new trial, on the ground of misdirection, the plaintiff consented to abandon that part of his demand to which the misdirection applied—the court, without the assent of the defendant, discharged the rule as a rule for a new trial, and made a rule absolute for reducing the damages. *Moore v. Tuckwell*. 607

MONEY HAD AND RECEIVED.

Action for, where maintainable.

1. Certain shares in a joint-stock company were deposited by B. with A., to be sold by A. in case B. neglected to provide for two bills accepted by A. for B.'s accommodation. B. having failed to provide for the bills, A. sold the shares, and gave notice of that fact to B., who refused to execute a transfer to the purchaser. In an action for money had and received, brought by A. to recover the amount paid by him to take up one of the bills, B. pleaded in bar the deposit and sale of the shares. Upon an issue taken on this plea:—*Held*, that B. was entitled to the verdict, notwithstanding his refusal to give effect to the sale, by executing a transfer. *Ross v. Moses*. 227

2. A *fi. fa.* issued against B. When the officer went to B.'s premises, on the 11th of July, to execute the warrant, he found a man in possession on behalf of trustees under a deed of assignment executed by B. for the benefit of his creditors. The officer thereupon retired without making a levy. On the 14th, a *fiat* issued against B., under which he was duly declared bankrupt. On the 15th of August, the officer again entered, and made an inventory of the goods on the premises, asserting that he considered himself in possession. On the 2d of September, the assignees of B. paid the sum claimed under the writ, in order to prevent the sheriff from proceeding to a sale, which he threatened to do:—

Held, that the assignees were entitled to recover back the money so paid, as money had and received to their use; and that, if necessary, it must be assumed, as against the sheriff, that he was, at the time, in possession of the goods. *Valpy v. Manley*. 594

And see BANKRUPT, II. 1.
LOTTERY.

MONEY PAID.

Action for, where maintainable.

The plaintiff and defendant respectively were under-leasees, at distinct rents, of separate

portions of premises, the whole of which were held under one original lease, at an entire rent. The plaintiff, having paid the whole rent under a threat of distress, brought an action to recover the proportion of rent due from the defendant, as for money paid to his use:—*Held*, not maintainable. *Hunter v. Hunt*. Page 300

NEGLIGENCE.

See NEW TRIAL, IV.

NEW TRIAL.

Miscarriage of the Officer in taking the Verdict.

1. In case for an infringement of a patent, the judge left three questions to the jury; and, on their retiring to consider their verdict, he handed to the associate an abstract of the pleadings, desiring him to take their finding separately on the three questions so submitted to them. The jury returned into court, stating that they found a verdict for the plaintiff generally. The counsel for the defendant requested the associate to put the questions separately: this he declined to do, notwithstanding one of the jurymen intimated that three points had been distinctly put to them by the judge; the plaintiff's counsel objecting to that course:—The court directed a new trial without costs. *Bentley v. Fleming*. 479
2. Affidavits of jurymen as to what passes among themselves with reference to a verdict, are not admissible. *Ibid*.

II. Inadequacy of Damages.

3. In case for an injury to the plaintiff's reputation, by the sale by the defendant of gunlocks of an inferior fabric with the name of the plaintiff stamped thereon, the jury having returned a verdict for the defendant, upon an issue on the sufficiency of *£1*. paid into court, on the ground that that sum covered the pecuniary damage actually sustained,—the court, on an application for a new trial, declined to interfere. *Manton v. Bates*. 444
4. In an action against a surgeon for negligence, whereby the plaintiff lost his leg, a verdict being found for the plaintiff with nominal damages, the court refused to grant a new trial, the judge having expressed himself satisfied with the verdict. *Gibbs v. Tynaley*. 640

III. Filing Affidavits.

5. The court will not allow additional affidavits to be filed in support of a motion for a new trial, after the expiration of the time for moving. *Ibid*.

IV. *Negligence of Attorney.*

6. The plaintiff in an action of crim. con. having been nonsuited in consequence of the accidental absence of his attorney, the court granted a new trial on payment of costs, as between attorney and client, it appearing that another action might be barred by the statute of limitations, and the plaintiff be thereby precluded from taking ulterior proceedings. *Ayling v. Goldring.* Page 635

And see LANDLORD AND TENANT.

LIBEL.

NONSUIT.

Where a defendant applies for a nonsuit on the ground that the contract declared on is not proved, and the judge declines to nonsuit, but reserves the point, and the jury find for the defendant, it is competent to him to set up the objection taken at the trial, in answer to a rule nisi for a new trial obtained on the ground that the verdict is against evidence. *Mummary v. Paul.* 316

NOTICE.

- I. *Of Act of Bankruptcy.*—See BANKRUPT, 1.

II. *Of Action.*

By an act for regulating the relief and employment of the poor of the parish of A., and for other local purposes, it is enacted that no action shall be commenced for any thing done in pursuance of that act, until after twenty-one days' notice, &c. In trespass against parish officers appointed under the act, for imprisoning the plaintiff in the workhouse upon a supposition that he was in a dangerous state of insanity:—*Held*, that the defendants, not having pursued the course pointed out to parish officers by the 9 G. 4, c. 40, with regard to pauper lunatics, and therefore not being protected by that act, were not entitled to notice of action under the local act. *Eliot v. Allen.* 18

- III. *Of Dishonour.*—See BILLS AND NOTES, II.

NUISANCE.

See CASE.

PAPER BOOKS.

- DELIVERY OF.—See REGULA GENERALIS, II.

PART-OWNER.

See EVIDENCE, II.

PATENT.

I. *Title of.*

1. In case for an infringement of a patent, the defendant pleaded—that the invention in respect whereof the letters-patent were grant-

ed, was an invention stated and expressed by the plaintiff, in applying for the letters-patent, to be, and was therein called and intitled "The invention of making or paving public streets and highways, and public and private roads, courts, and bridges with timber or wooden blocks"—that the letters-patent were granted for and in respect of the said invention, by and under the name, style, and title of "The invention of making or paving public streets and highways, and public and private roads, courts, and bridges with timber or wooden blocks;" and by and under no other name, style, or title—and that the said style and title was, in its claim, description, and definition of the said invention, too large, uncertain, ambiguous, and vague, and inconsistent, inapplicable, and so variances in respect of, to, and with the nature of the invention as described and ascertained by the specification; by reason whereof the patent was void. The plaintiff replied, that the letters-patent were granted for and in respect of a certain invention called and intitled "An invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber and wooden blocks," and not for "The invention of making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks:?"—*Held*, an apt traverse of the plea. *Stead v. Carry.*

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II. *Enrolment of Specification.*

2. A declaration in case for infringement of a patent, set out the proviso for making the letters-patent void in case of the non-enrolment of a specification within six calendar months, and averred performance of that condition. Plea, that the patentee "did not particularly describe and ascertain the nature of the alleged invention, and in what manner the same was to be performed," concluding with a verification:—*Held*, that performance of the condition of enrolment was properly alleged in the declaration; though it did not appear on the face of the declaration, directly, or by necessary implication, that the six months allowed for enrolment had expired before action brought. *Bentley v. Goldharp.* 368
3. *Held*, also, that the plea improperly concluded with a verification. *Ibid.*

III. *Construction of Specification.*

4. A. obtained a patent for "improvements in the manufacture of woollen fabrics, or fabrics of which wools, furs, or hairs, are the principal ingredients, as well as for the machinery used therein." In the specification, the main object of the inventor was stated to be

"the making of cloth by felting alone, without spinning or weaving;" and the principal feature of it to be, the "obtaining a long, even, and uniform bat of wool, or other materials, of any required length, width, or thickness, suitable to be made into commercial ends or pieces of cloth." The specification described the mode of producing cloth by felting, by receiving the sliver direct from the carding-engine, between two long revolving aprons, and placing it in successive folds, until the required thickness was attained: it then described the process of felting, and the machinery used for that purpose, recommending the use of soap and water in combination with rollers, in preference to acidulated water, as theretofore used, and proceeded as follows:—"In order to increase the felting action, it is very desirable to allow the felting rollers to act upon the cloth in as many directions as possible. By the reciprocating motion of this machine, we have seen that this action is produced, in each direction, longitudinally; and, in order to do this in other directions, the cloth is taken from the last machine and placed in the entering end of another similar felting-machine; but, instead of being entered as before, the piece is first passed between two feeding-rollers, T., one of which is shown in figure 20, and which are placed at an angle with the feeding apron, of near forty-five degrees. These two rollers have a velocity of from three to four times that of the feeding-apron upon which the cloth is thrown in regular folds as it enters, lying at nearly the same angle as the position of the rollers. This now causes the action to take place diagonally across the piece of cloth, and after having passed through in this direction, it is reversed, and, when again passed, the action is nearly at right angles with the last." The specification then proceeded to describe a raising machine, the raising-cylinders of which are placed in a diagonal position, "one acting from one of the lists towards the other, and the other in the opposite direction."

The patentee claimed (amongst other things) the application of the compound apron, and the extended sliver itself as described in the specification, applied to forming a bat by successive folds or layers, for the production of long or commercial ends of cloth, without spinning or weaving; and also the diagonal or cross-felting as before described; the diagonal position of the raising-cylinders; and the use of soap and water, in combination with the rollers, in lieu of acidulated water.

Prior to the date of the patent in question, B. obtained a patent for "improvements in the manufacture of hosiery, shawls, carpets, rugs, blankets, and other fabrics." In

his specification, B. described a mode of cross-felting,—which was stated by one of the defendant's witnesses to be substantially the same in principle as that described by A., as follows:—"The rollers, R., are made to traverse across the semi-cylinders; and, after passing many times across them, so as thoroughly to roll the bat horizontally, the rollers should be lifted up, by means of straps attached to their ends, and by suitable machinery placed above the same; and the position of the rollers should then be shifted, so as to make them travel angularly; first, several times in one direction, and afterwards, by being again properly shifted, from angle to angle, in the opposite direction." Both soap and water had been used before in felting, and rollers also, but not in combination:—

Held, that the claims in the specification in respect of the formation of a bat by the extended sliver as therein described, the raising-machine, and the method of cross-felting, were not too large. *Allen v. Rawson*.

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5. *Held*, also, that the claim for the use of soap and water in conjunction with the rollers, was well founded. *Ibid*.

IV. Confirmation of, by Act of Parliament.

6. By an act of parliament, to be judicially taken notice of, reciting, that letters-patent had been granted to A.; that the specification was enrolled within six months instead of being enrolled within four months after the date thereof, as required by the letters-patent; that the letters-patent contained a proviso for making them void if they should become vested in, or in trust for, more than twelve persons; and that certain persons had agreed to form themselves into a company for the purpose of working the patent—powers were given for the formation of a company, and enabling the patentee to assign the patent to them, or to license them to work it. A subsequent section, reciting the non-enrolment of a specification within due time, and that such non-enrolment had arisen from inadvertence and misinformation, and that it was expedient that the patent should be rendered valid to the extent thereafter mentioned, enacted, that the letters patent should, during the remainder of the term, be considered, deemed, and taken to be as valid and effectual to all intents and purposes as if the specification thereunder, so enrolled by A. within six months after the date thereof, had been enrolled within four months:—

Held, that the confirmation of the patent was unconditional, and was not dependent on the formation of a company. *Stead v. Carry*.

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- 7 The defendant further pleaded, that, before the passing of the act, and after the expiration of four calendar months next and immediately after the date of the plaintiff's patent, he obtained a patent for an invention of certain improvements in paving for covering streets, roads, and other ways; that his invention then applied to blocks of wood, and was a material and substantial and *bonâ fide* improvement of and upon the invention of the plaintiff; that the same could not be made, used, or exercised without at the same time making, using, and putting in practice the plaintiff's invention; and that, in the due and legitimate exercise and enjoyment of his patent, he necessarily and unavoidably used the plaintiff's invention:—*Held*, bad on demurrer; the operation of the statute being to effect a complete confirmation of the plaintiff's patent, and to preclude the defendant from using the plaintiff's invention, notwithstanding the grant to the defendant. *Stead v. Carey*.

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V. Suggestions by Workmen.

8. The adoption by an inventor of a suggestion made in the course of experiments, of something calculated more easily to carry his conceptions into effect, does not affect the validity of the patent. *Allen v. Rawson*. 551

VI. Plea justifying under a former Patent.

9. To a declaration in case by A. against B., for the infringement of a patent for "improvements in pumps," setting out the grant of the letters-patent to A. in 1837, and a disclaimer of part of the specification in 1844, and charging a subsequent making and vending, &c., of A.'s invention by B., B. pleaded, that, after the making of the letters-patent, and before the disclaimer, C. obtained a patent for "improvements in water-closets and stuffing boxes applicable to pumps and cocks;" that, after the grant of the letters-patent to C., and before A.'s disclaimer, C. granted a license to B. to make, use, &c., his invention, so far as the same was applicable to stuffing-boxes applicable to pumps; that B. had made and sold divers large quantities of pumps under the said license, and that the grievances in the declaration were the making, using, &c., as aforesaid, the said improvements in pumps for which the said letters-patent were granted to C., and the said license granted to B.;—*Held*, that the plea did not sufficiently confess and avoid the matters charged in the declaration. *Stocker v. Warner*. 148

VII. Effect of Disclaimer.

10. *Quere*, the effect of a disclaimer of part of a specification, upon rights acquired under

a patent granted to another person previously to the entry of such disclaimer. *Stocker v. Warner*. Page 148

And see COPYRIGHT, II.

PAYMENT SUPRA PROTEST
See BILLS AND NOTES, II.

PENALTY.

See TURNPIKE ACTS.

PIRACY.

See COPYRIGHT.

PLEADING.

See COPYRIGHT, I.

GUARANTEE.

INCOME TAX ACT.

INSOLVENT DEBTOR.

PATENT, I. II. IV. 2.

TRESPASS.

I. Assumpsit.

I. Averment of Readiness and Willingness.

1. A declaration for not accepting a quantity of guano, alleged that the plaintiffs were ready and willing to deliver the guano according to the terms of the contract:—*Held*, sufficient, on special demurrer; and that it was not necessary for the plaintiffs to aver a tender or offer to deliver, or that the defendant dispensed with a tender. *Eoyd v. Lett*. 223

2. Allegation of Breach.

2. In assumpsit by A. against B., the declaration set out an agreement under which B. was to be let into possession of a public-house, and to purchase certain fittings, &c., for 65*l.*, 4*l.* thereof to be paid immediately, and the residue on the 30th of July, on which day B. was to be let into possession; and, if either party failed to fulfil the agreement, he was to forfeit 30*l.* to the other, on demand. Averment, that A. was always ready and willing, and offered to give possession, and to sell, and deliver the fittings, &c. Breach, that, although B. paid the 4*l.*, yet he did not pay the plaintiff the 61*l.*, or any part thereof, or pay the plaintiff the 30*l.*, or any part thereof: *Held*, on special demurrer, assigning for cause that there had been no demand of the 30*l.*, that the breach was sufficient, notwithstanding the reference to the clause of forfeiture by the introduction of the words negating the payment of the 30*l.* *Maylam v. Norris*. 244

II. Case.

1. Traverse too Large.

3. To a count in trover for converting cattle and goods, to wit, beasts of the plough, implements of husbandry, books, bedsteads, &c., the defendant pleaded a justification of the

surety as a distress for rent. The plaintiff replied, that he was a husbandman, and that the goods mentioned in the count were boasts of the plough and implements of husbandry, there being other available distress upon the premises at the time:—*Held*, bad on special demurrer, inasmuch as it professed to answer the whole of the plea, which plea embraced all the articles enumerated (under a *vide licet*) in the count, some of which were not implements of husbandry. *Davies v. Aston.* Page 746

2. What put in Issue by "Not Guilty."

4. A declaration in case, by A. against B., for not attending the trial of a cause between A. and C. in obedience to a *subpoena*, alleged that A. had a good cause of action against C., and that the testimony of B. was material evidence for A. on that trial; and that, in consequence of such non-attendance, A. was compelled to withdraw the record, and became liable to pay to the then defendant the costs of the day, and also incurred costs in preparing for trial. B. pleaded—not guilty—*ave* and license—and that A. might have proceeded to the trial without his testimony:—

Held, that B. having admitted, by his course of pleading, that A. had a good cause of action against C., it was not competent to B. to avail himself of the record in that suit, (which was put in by A. for the purpose of showing that such record existed and had been withdrawn,) to show that the declaration therein was so defective that a verdict thereon would have been fruitless. *Needham v. Fraser.* 815

5. In case for a fraudulent representation on the sale of a commission business, the declaration alleged that the plaintiff bargained with the defendant to buy his interest in a certain lease, and certain fixtures, &c., and the good-will of a certain business, for 700*l.*, and that the defendant, by falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commission in the course of the business, and the net profits of the trade, were of a certain amount, then sold to the plaintiff the said lease, fixtures, &c., and the goodwill of the said business at and for a certain sum; and it then went on to allege that the representation was false, and a consequent damage to the plaintiff:—*Held*, that, under not guilty, the plaintiff was bound to prove a sale, (by production of the agreement between the parties, which appeared to be in writing,) as well as a false and fraudulent representation; and that it was not enough to prove an assignment of the lease, &c. *Mumery v. Paul.* 316

III. Covenant.

Plea of Eviction.

6. To covenant for rent under an indenture, the defendant pleaded, in bar of the further maintenance of the action, as to 52*l.* 10*s.*, parcel of the rent, that the plaintiff held under a lease from A., subject to a proviso for re-entry by A. for breach of covenant; that, on the 1st of January, 1844, before any part of that rent became due, the plaintiff incurred a forfeiture by breach of covenant; that, in consequence of such forfeiture, A. recovered in ejectment against the plaintiff; and that the defendant afterwards paid A. 52*l.* 10*s.*, for the profits from the day of the demise in the declaration (1st of January, 1844):—*Held*, that the plea disclosed a substantial answer as to the 52*l.* 10*s.*, *argumentativeness* not being pointed out as a ground of demurrer. *Franklin v. Carter.* Page 750

IV. Debt.

1. Plea amounting to "Never Indebted."

7. To a count in debt upon an account stated, the defendant pleaded, as to 18*l.*, parcel of the money in that count mentioned, an agreement between him and one E., that he should purchase of E. the good-will, stock, and fixtures of a public-house, 20*l.* to be paid as a deposit, to be returned in case E. should not fulfil the agreement on her part; that the defendant paid to the plaintiff 2*l.* in part of the deposit, and gave him an I. O. U. for 18*l.*, "which I. O. U. was the account stated in the last count mentioned as to the said sum of 18*l.*, parcel, &c.;" and that E. failed to perform the agreement on her part, and consequently became bound to return the deposit, of which plaintiff had notice:—*Held*, bad on special demurrer, as amounting to never indebted. *Jacobs v. Fisher.* 178

2. Solvit post Diem.

8. Debt on bond in the penal sum of 4000*l.*, the condition of which bond—after reciting that the obligor was indebted to the obligees in 2000*l.*, and that the latter had agreed to accept from the former, interest at 6*l.* per cent., payable half-yearly, during the joint lives of the obligees and his wife, in full satisfaction and discharge of the debt, provided the same were regularly paid—was declared to be, that, if the obligor should pay the interest in the manner stipulated, the obligation should be void; but, in case of failure in payment of all or any part of the interest for twenty-eight days next after each payment should become due, the same having been demanded, the bond was to remain in full force. The condition further stated that it was agreed, that in case of failure in making the several payments aforesaid, within the respective times aforesaid, the

bond, or any payments made under the same, should not be construed or taken as a discharge of the debt of 2000*l.*, or any part thereof, but the same should forthwith, after such default, become due and payable to the obligee, his executors, &c.

The defendant pleaded, that payment of the second half-yearly payment was not demanded by the plaintiff on the day it became due, or at any time within twenty-eight days after, but that the defendant, after the twenty-eight days, and before the commencement of the action, paid the same to the plaintiff, who accepted it in satisfaction, &c.:—*Held*, on special demurrer, that this was not a good plea of *solvit post diem*, within the 4 Ann. c. 16, s. 12. *Marriage v. Marriage*.

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V. Trespass.

Justification.

9. To a declaration in trespass *quare clausum fregit*, charging an assault, it is no plea that the close was the soil and freehold of J. S., and that the assault was committed by the command of J. S. in removing the plaintiff, after request, from the premises, without alleging that J. S. was possessed of the close. *Roberts v. Tayler*. 117

And see COSTS, I.

VI. Ambiguity.

10. To a count by A. against B. for goods sold and delivered, B. pleaded, as to 4*l.*, parcel, &c., that on a certain day, at the request of A., he delivered to C., for A., certain goods; that it was "then," to wit, on the day and year aforesaid, in consideration thereof, agreed between A. and B. that A. should accept such delivery to C. in full satisfaction and discharge of the premises as to the 4*l.*, &c., and that A. did "then" accept such delivery in full satisfaction and discharge:—*Held*, on special demurrer for ambiguity, that the plea was bad, inasmuch as it might mean either that the agreement to accept the delivery of the goods to C. in satisfaction took place at the same time as the delivery, or at a subsequent period. *Stead v. Poyer*. 782

VII. Duplicity.

11. In debt on a promissory note, by payee against maker, the declaration, after showing that the writ issued on the 17th of May, 1845, alleged that the defendant, on the 25th of March, 1844, made his note in writing, and thereby promised to pay to the plaintiff or order 890*l.* on the 25th of March, 1845, which day had expired before the commencement of the suit, and then delivered the note to the plaintiff; and that thereupon the defendant then agreed to pay the amount of the said note to the plaintiff, on request.

Special demurrer, assigning for causes that the declaration was double and inconsistent, and that it was uncertain whether the plaintiff intended to rely on an express or an implied agreement:—

Held, that the declaration was sufficient.

Sheppard v. Sheppard.

Page 849

12. Duplicity is no objection to a count. *Ibid*.

And see LOTTERY, 4.

VIII. Immaterial Matter.

13. A replication which answers the only material part of a plea, is good, notwithstanding the introduction of an insufficient answer to immaterial matter in the plea. *Hammond v. Colls*. 916

IX. *Liberum Tenementum*—See CUSTOMARY FREEHOLD.

X. Plea in Confession and Avoidance—See BANKRUPT.

XI. *Asserment of Performance of Condition Precedent*—See PATENT, II. 1.

XII. General Plea of Performance of the Condition of a Bond—See BOND.

XIII. Illegality of Consideration—See LOTTERY, 3.

XIV. Conclusion of Plea—See PATENT, II. 2.

XV. *Replication de Injuris*.

14. A declaration in assumpsit charged the defendant, in two counts, as the acceptor of two bills of exchange, and in other counts, for money lent, money paid, interest, and upon an account stated. The defendant pleaded, as to the first and second counts, and as to 852*l.* 9*s.* 6*d.*, parcel of the moneys in the third and subsequent counts, that the bills were respectively drawn and accepted for and on account of the sums they severally represented, parcel of the said sum of 852*l.* 9*s.* 6*d.*, and for no other consideration; that, after they respectively became due, and before the commencement of the suit, the defendant and one P. transferred certain stock of the value of 416*l.* 17*s.* 6*d.* in full satisfaction and discharge of the sum of 416*l.* 17*s.* 6*d.*, parcel, &c., and of the causes of action in the declaration, so far as they related to the said sum of 416*l.* 17*s.* 6*d.*; that the defendant gave the plaintiff, and the plaintiff took and received from the defendant, three several bills of exchange for 145*l.* 4*s.* each; and that the plaintiff accepted and received the stock and the bills in full satisfaction and discharge of the said sum of 852*l.* 9*s.* 6*d.*, and of the causes of action in the declaration mentioned, so far as they related thereto. The plaintiff replied *de injuriis*:—

Held, that, as the plea set up matter in discharge, and not in excuse, the replication was improper. *Barnes v. Price*. Page 214

POSSESSION.

Allegation of—See PLEADING, V.

POSTEA.

See AMENDMENT, II.

POWER.

Execution of.

By a deed of settlement preparatory to the marriage of A. and B., lands were conveyed to C. and his heirs, to the use of B. and her heirs, until the marriage; and, from and immediately after the solemnization thereof, to the use of such person or persons, for such estate or estates, and upon such trusts, &c., as B., notwithstanding coverture, and whether covert or sole, and without consent, &c., should, by any deed or writing under seal, or by her last will, or any writing in the nature of, or purporting to be, her last will, or any codicil thereto, limit, direct, or appoint, &c.; and, in default of and until such appointment, to the use of C., during the joint lives of A. and B.; and, after the decease of either of them, to the use of B., her heirs and assigns, for ever.

After the execution of the settlement, and before the marriage, B., by a codicil to a will made by her some months previously, in terms referring to the power contained in the settlement, devised the lands in trust for the children of the marriage, and, in default or failure of children, in trust for A. for life:—

Held, a good execution of the power, though the deed was executed before the marriage, and the event upon which it was to take effect, viz., the marriage of A. and B., was contingent. *Logan v. Bell*. 872

And see COVENANT, II.

PRACTICE.

See ADMISSIONS.

COSTS, III.

DAMAGES.

DISCONTINUANCE.

DISTINGUISH.

JUDGMENT AS IN CASE OF A NONSUIT.

NONSUIT.

NOTICE OF ACTION.

WARRANT OF ATTORNEY.

I. *Irregularity, when to be taken Advantage of.*

1. After regular appearance entered for the defendant, *sec. stat.*, a motion to set aside the declaration and subsequent proceedings on the ground that the defendant has not been served with process, is too late. *Brooks v. Roberts*. 636

2. The application should have been, to set aside the appearance. *Brooks v. Roberts*. Page 636

II. *Issuable Pleas.*

3. An objection that pleas delivered by a defendant under terms to plead issuably, are not issuable pleas, if waived by service of an order for particulars of set-off. *Scott v. Watson*. 826

III. *Staying Proceedings.*

4. An action by A. against B., to recover the amount of two checks and interest, being at issue in the Exchequer, and the trial appointed for the 7th of December, a negotiation takes place on the 6th, when it is arranged that the record shall be withdrawn, and that B. shall submit to a judge's order for payment of the amount claimed on the 14th, otherwise judgment, and that certain proceedings in Chancery taken by B. against A. shall be withdrawn. An order is accordingly drawn up and served. B. subsequently discovering evidence that he conceives will enable him to substantiate his defence to the action, obtains a rule to set aside the judge's order, upon payment of costs. These costs are taxed and paid to A., who afterwards brings an action in this court against B. for breach of the agreement under which the judge's order was drawn up:

The court refused to stay the proceedings in the second action, as not being founded upon the same cause of action as the first. *Wade v. Simson*. 610

And see EJECTMENT, II.

IV. *Undertaking to give Material Evidence.*

5. The defendant bought goods of A. at Southampton, which were sent to him at Southsea, in Hampshire. Two months afterwards the plaintiff, (for whom, it appeared, A., as agent, had made the contract,) sent the defendant a duplicate invoice enclosed in a letter posted in Middlesex. In reply the defendant disclaimed all knowledge of the plaintiff, but admitted the contract with A., and expressed his willingness to pay the plaintiff, provided A. authorized him so to do:—*Held*, that these letters, A.'s agency being proved, were sufficient to satisfy an undertaking to give material evidence in Middlesex. *Gilling v. Dugan*. 8

V. *Trial by Proviso.*

6. *Quere*, whether a writ of trial can be carried down by proviso. *Nicholson v. Jackson*. 623

VI. *Staying Execution.*

7. The court refused to stay execution in an action upon a judgment for a sum exceeding 20*l.* recovered in a suit originally brought for a debt not amounting to that sum, upon

a suggestion that the proceeding was in fraud of the 7 & 8 Vict. c. 96, s. 57. *Joseph v. Baxter.* Page 231

PRETENCED TITLE.

Sale of.

1. A sale by an administrator of a "pretended right or title" to premises of a term in which the intestate died possessed, but of which the administrator never had possession, is within the prohibition of the statute 32 H. 8, c. 9. *Doe d. Williams v. Evans.* 717
2. A., possessed of a term, died in 1838. B., who had during A.'s life resided on part of the premises, at A.'s death claimed and took possession of the whole, and retained it till he died in 1839, having by his will devised the premises to C., who remained in undisturbed possession until 1841, when A.'s next of kin took out letters of administration, and sold his right or title in the premises to D.:—*Held*, that the conveyance was void, as well at common law as by 32 H. 8, c. 9. *Ibid.*

PRISONER.

Charging in Execution.

1. The endorsement of a judge is a sufficient authority for the issuing of a writ of habeas corpus ad satisfaciendum, in order to bring up a prisoner to charge him in execution. *Gibb v. King.* 1
2. The 85th rule of H. 2 W. 4, which requires a prisoner to be charged in execution within two terms after trial or judgment, does not apply to a party in criminal custody. *Ibid.*
3. This court has no power to issue a writ of habeas corpus ad satisfaciendum, to charge in execution a prisoner in custody under a conviction for a misdemeanor. *Ibid.*
4. A party in custody under process of contempt of this court, is liable to be charged in execution upon a judgment in this court in the ordinary way. *Wade v. Wood.* 462

PROCESS.

See DISTINGUAS.

PROMOTIONS, 1004.

PROPERTY TAX.

See INCOME TAX ACT.

PROTEST.

See BILLS AND NOTES, II.

PROVISO.

See WRIT OF TRIAL.

PUBLICAN.

See HORSE-RACING. LOTTERY.

QUIET ENJOYMENT.

See COVENANT, II.

RATHABITIO.

See p. 59, n. (a).

REGULA GENERALIS.

I. Judges' orders as to signing judgment.

Page 621

II. Delivery of paper-books.

871

REPLEVIN.

See DAMAGE FRASANT

REWARD.

The defendants, by public advertisement, offered a reward of 20*l.* to any person who would give such information as should lead to the apprehension and conviction of the party or parties who had broken into, robbed, and set fire to their premises. One B., whom the plaintiff had taken into custody on suspicion of being concerned in the offence, offered to make certain disclosures if furnished with something to eat and drink. The plaintiff communicated this offer to a sub-inspector of police, who took B. to a public-house, and gave him refreshment; whereupon B. made a voluntary confession, which resulted in his conviction and transportation for the crime in question:—*Held*, that the plaintiff was entitled to the reward. *Smith v. Moore.* 430

RIGHT OF ENTRY.

See p. 719, n. (b).

RIGHT OF WAY.

See TRESPASS, II.

RIGHT, WRIT OF.

See WRIT OF RIGHT.

RULE TO DISCONTINUE.

See DISCONTINUANCE.

RULES.

See REGULA GENERALIS.

SALE.

See MONEY HAD AND RECEIVED, I. PLEADING.

1. A. chartered a vessel, of which B. was master and part-owner, for a voyage from London to Sydney, for a gross sum of 1600*l.*, payable two months after clearance at the custom-house. A. bought goods of C. to be shipped on A.'s own account on board the vessel, and to be paid for before the vessel left the port of London. The goods were accordingly shipped by C., who took from the mate receipts as for goods shipped on C.'s account, and which receipts were still kept by C. Two days after the goods were shipped, A. became insolvent and unable to perform his contract with C., and sold

quantly agreed with C. to rescind it, and signed an order directing B. to deliver the goods to them. The goods were demanded on behalf of C., both before and after the rescission of the contract, C. offering at the same time to pay all reasonable charges attending such re-delivery, and every lawful claim the owners might have upon the goods. B. refused to deliver the goods to C., on the ground that, they having been shipped for the voyage stated in the charter-party, it was the duty of B. to convey them to their destination:—*Held*, that, assuming that the property in the goods passed to A. by the shipment, yet, as A. had neither become bankrupt nor taken the benefit of the insolvent act, but continued *sui juris* up to the time of making the agreement to rescind the contract—by the operation of that agreement and the delivery order given by A., the property in the goods re-vested in B., either in his original right as vendor, or as a new right derived from the assignment of the vendee; and that the refusal of B., upon the ground stated by him, to re-deliver the goods after the demand by C., the contract with A. being rescinded, and the offer then made of the payment of the reasonable charges and all lawful claims, was a wrongful conversion; there being nothing in the terms of the charter-party that could restrain the charterer from dealing with the cargo as he thought proper, or prevent him from taking out the cargo before the sailing of the vessel, or to entitle the master to insist on carrying it to its original destination. *Thompson v. Small.* Page 328

2. *Quare*, whether or not C. derived a new right from retaining the mate's receipt and the demand made by him before the rescission of the contract? *Ibid.*

SECURITY FOR COSTS.

See COSTS, III.

SET-OFF.

Order for Particulars of—See PRACTICE, II.

SHARES.

Transfer of—See MONEY HAD AND RECEIVED, I.

SHIP AND SHIPPING.

See SALE.

SMALL DEBTS.

See PRACTICE, VI.

SOLVIT POST DIEM.

See PLEADING, IV. 2.

SPECIFICATION.

Construction of—See PATENT, III.

STAMP.

On Agreements.

1. The insertion of the words "for value received," do not render an I. O. U. liable to a note or an agreement stamp. *Gould v. Coombs.* Page 543
2. A joint-stock company, of which the plaintiff and defendant were directors, occupied a house belonging to the plaintiff. A draft agreement, prepared by the plaintiff's attorney, was submitted to the solicitors of the company, and by them approved and returned: and, at a subsequent meeting of the directors, a resolution was made empowering the solicitors to sign the agreement on behalf of the company. The agreement, however, was never signed. In debt for use and occupation, the plaintiff offered the draft in evidence, not as an agreement binding *per se*, (it being neither dated, stamped, nor signed,) but for the purpose of showing that the occupation of the premises was to be by the other directors, *exclusive of himself*:—*Held*, that the draft was inadmissible, for want of a stamp, inasmuch as it could only be relied on as proof of the special agreement, the plaintiff's position precluding him from maintaining an action against a co-director upon an implied contract. *Chadwick v. Clarke.* 700
3. In assumpsit upon articles of agreement, and a memorandum of the same date, endorsed thereon, varying the terms, the consideration for the defendants' promise was alleged to be the making of the articles and memorandum, and the undertaking by the plaintiffs that they would perform every thing in the articles and memorandum contained on their part to be performed. To prove the promise, and that it was made upon the consideration alleged, the plaintiffs offered in evidence the part of the articles in their custody, signed by the defendants, with the memorandum on the back thereof, signed by the clerk of the company, and by the agent of the defendants. Both these were duly stamped; but the signatures of some of the defendants to the articles being attested by a witness whose absence was not accounted for, it was objected that the articles were not admissible; and they were accordingly rejected. The plaintiffs then called for the part of the articles and memorandum which was in the possession of the defendants, as well to prove the consideration stated in the declaration as to meet the above objection. The articles were stamped, but the memorandum was not; on which ground it was objected to on the part of the defendants, and rejected:—

Semble, that the evidence was properly rejected. *Fishmongers' Company v. Roberts.* 69

STATUTE OF FRAUDS.

Interest in Land—See ACCOUNT STATED.

STAYING PROCEEDINGS.

See DISCONTINUANCE.

EJECTMENT, II.

PRACTICE, III.

TENDER.

See DAMAGE FRASANT.

PLEADING, I. 1.

TITHES.

Appeal against Award of Commissioner.

Where, in proceedings before a tithe-commissioner under 6 & 7 W. 4, c. 71, s. 45, several moduses are set up in respect of distinct farms, and the annual value of the payment to be made in respect of each farm is less than 20l., his decision is final, notwithstanding the whole is in the hands of the same proprietor, and the aggregate yearly value exceeds 20l. *Tomlinson v. Boughey.* Page 663

TITLE.

See PREFERRED TITLE.

TOBACCO.

See WRECK.

TRESPASS.

1. Justification under a Writ of ft. fa.

2. To a plea in trespass *quare domum fregit* by A. against B., B. justifies under a ft. fa. upon a judgment obtained by B. against A. A. replies, that the writ was irregularly sued out and prosecuted, and that, by a judge's order (subsequently made a rule of court) it was ordered that the writ, and the proceedings thereon, should be set aside:—

The replication was held good, as sufficiently showing that the writ was set aside for irregularity. *Rankin v. De Medina.* 183

II. Justification of, in Assertion of a Right of Way.

2. In a declaration in trespass *quare clausum fregit*, the first count charges a trespass in "a certain close called the Church Meadow, and a certain other close called the Garden." The second charges a trespass in the same closes, "in other parts thereof." The defendant pleads a public right of way over the closes in the declaration mentioned. Upon proof of one public right of way over these two closes, the defendant is entitled to the verdict upon an issue taken on the right of way pleaded. *Wood v. Wedgewood.* 273

III. *Justification of Assault—See PLAMMER.*

And see CASE, II. 2.

DAMAGES, II.

TROVER.

Where maintainable.

A., being indebted to B., by a bill of sale, which was found to have been *bona fide* executed, conveyed to him all his stock in trade, household furniture, &c., absolutely. The bill of sale contained a covenant by A. to pay the debt on demand, and a proviso for redemption on payment of the debt and interest on demand, and a further proviso that the assignor should continue in possession until default. The goods having before any demand made by B., been seized by the sheriff under a ft. fa. upon a judgment against A.—

Held, that B. had not such a right of immediate possession as to entitle him to maintain trover. *Bradley v. Copley.* Page 685

And see BAILMENT.

PLEADING, V.

SALE.

TRIAL BY PROVISIO.

See WRIT OF TRIAL.

TURNPIKE ACTS.

Construction of.

1. By a local act "for amending the roads and highways in the Isle of Wight," the commissioners were empowered to erect turnpikes and toll-houses, and to demand and take certain tolls from persons passing through the same; and power was also given to them to raise money for the purposes of the act, upon loans secured by mortgage of the tolls during the continuance of the act. The time for which the act was to be in force expired in 1834. By the 4 & 5 W. 4, c. 10, "all and every act and acts of parliament for making, amending, and repairing any turnpike roads in Great Britain which would expire with the then present or the next session of parliament," are continued:—*Held*, that the local act was thereby continued and kept alive as to so much thereof as related to turnpike roads, notwithstanding it contained provisions applicable to other objects. *Barrow v. Whit.* 192

2. The general turnpike act, 3 G. 4, c. 124, enacts, s. 41, "that, if any person shall fraudulently or forcibly pass through any such toll-gate with any horse, cattle, beast, or carriage, or shall do any other act whatever, in order or with intent to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall, for every such offence,

forfeit and pay any sum not exceeding \$1," and directs, s. 141, that all penalties by the act authorized to be imposed, shall be levied, together with the costs attending the information and conviction, by distress and sale of the offender's goods, by warrant, the overplus to be returned, after payment of the penalty and the charges of the distress and sale, and that the penalty shall be paid,—one moiety to the informer, and the other moiety to the treasurer or treasurers to the trustees or commissioners for repairing and maintaining the road on which such offence was committed. Sect. 148 enacts, "that the forms of proceeding relative to the several matters contained in this act, which are set forth and expressed in the schedule thereto annexed, may be used upon all occasions, with such additions and variations only as may be necessary to adapt them to the particular exigencies of the case; and that no objection shall be made, or advantage taken, for want of form in any of such proceedings.

A conviction under the above acts stated that J. B., on, &c., in the parish of C., "on the turnpike road before then made and then being under the authority of the local act, with a certain carriage, to wit, a cart, drawn by one horse, did unlawfully, fraudulently, and forcibly pass through a certain toll-gate there legally situate and being under the authority of the said act; by reason whereof the payment of a certain toll, to wit, the sum of 3d., then and there legally due, demanded, and payable, under the authority of the said act, by and from the said J. B., for and in respect of the carriage so drawn as aforesaid, was avoided, contrary to the form of 3 G. 4, c. 126."

The warrant thereon stated that the said J. B., on, &c., in the parish of C. aforesaid, "with a certain carriage, to wit, a cart, drawn by one horse, did unlawfully, fraudulently, and forcibly pass through a certain toll-gate then and there situate and being; by means whereof the payment of a certain toll, to wit, the sum of 3d., then and there legally due and payable by and from the said J. B. for and in respect of the carriage so drawn as aforesaid, was avoided, contrary to the statutes in such case made and provided;" and it directed that the penalty should be paid, one moiety to the informer, and the other moiety to "the treasurer of the commissioners for amending the roads and highways in the Isle of Wight, being the place where the said offence was committed."

Held—first, that the conviction, which followed the form given in the schedule, was sufficient.

Secondly, that it was no objection that the warrant, in describing the offence, did

not follow the precise words of the conviction.

Thirdly, that the warrant disclosed a legal cause of forfeiture.

Fourthly, that the application of the penalty in the warrant was a sufficient compliance with the statute, though by the form given in the schedule, it was to be paid, one moiety to the informer, and the other moiety "to the surveyor of the turnpike-road where the said offence, &c., happened."

Fifthly, that the adjudication as to the costs was sufficient.

Sixthly, that no demand of the penalty previous to the issuing of the warrant was necessary. *Barnes v. White.* Page 192

VARIANCE.

See GUARANTEE.

VENDOR AND PURCHASER.

See SALE.

WAIVER.

See PRACTICE, II.

WARRANT.

Form of—See TURNPIKE ACTS, 2.

WARRANT OF ATTORNEY.

I. Attestation of.

A warrant of attorney was attested by A. an attorney, introduced to the defendant by the plaintiff's attorney, the defendant thereupon naming A. and requesting him to attend on his behalf, by repeating after the plaintiff's attorney the proper form of words, which were read by the latter from the body of the instrument:—*Held*, sufficient. *Walton v. Chandler.* 306

II. Successive Executions.

The defeasance of a warrant of attorney contained an agreement that no execution or executions should be issued upon the judgment entered up thereon until default in the payment of an annuity; but that, in case of default, it should be lawful for the grantee, his executors, &c., to sue out execution or executions thereon—not saying, "from time to time:" the defeasance also contained a proviso for entering satisfaction after the decease of the grantor, and full payment of the annuity up to the day of his decease:—*Held*, that the grantee was not restrained by this defeasance from issuing successive executions for arrears. *Cuthbert v. Dobbin.*

And see ANNUITY, II. 2.

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WAY.

See *TRESPASS*, II.

WILL.

See *DAVISE*.

WITNESS.

I. *Examination on Interrogatories*—See *COMMISSION*.

II. *Competency of*—See *EVIDENCE*, II.

III. *Disobedience of Subpoena*—See *PLEADING*, II. 2.

WRECK.

Within stat. 3 & 4 W. 4, c. 52, s. 50.

A revenue act (3 & 4 W. 4, c. 52, s. 50) directs that "foreign goods derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, shall be subject to the same duties as goods of the like kind imported into the United Kingdom respectively, are subject to; provided that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor, &c., and shall be deemed

to be unenumerated goods, and shall be liable to be charged with duty accordingly;" that is 5*l.* per cent. *ad valorem*.

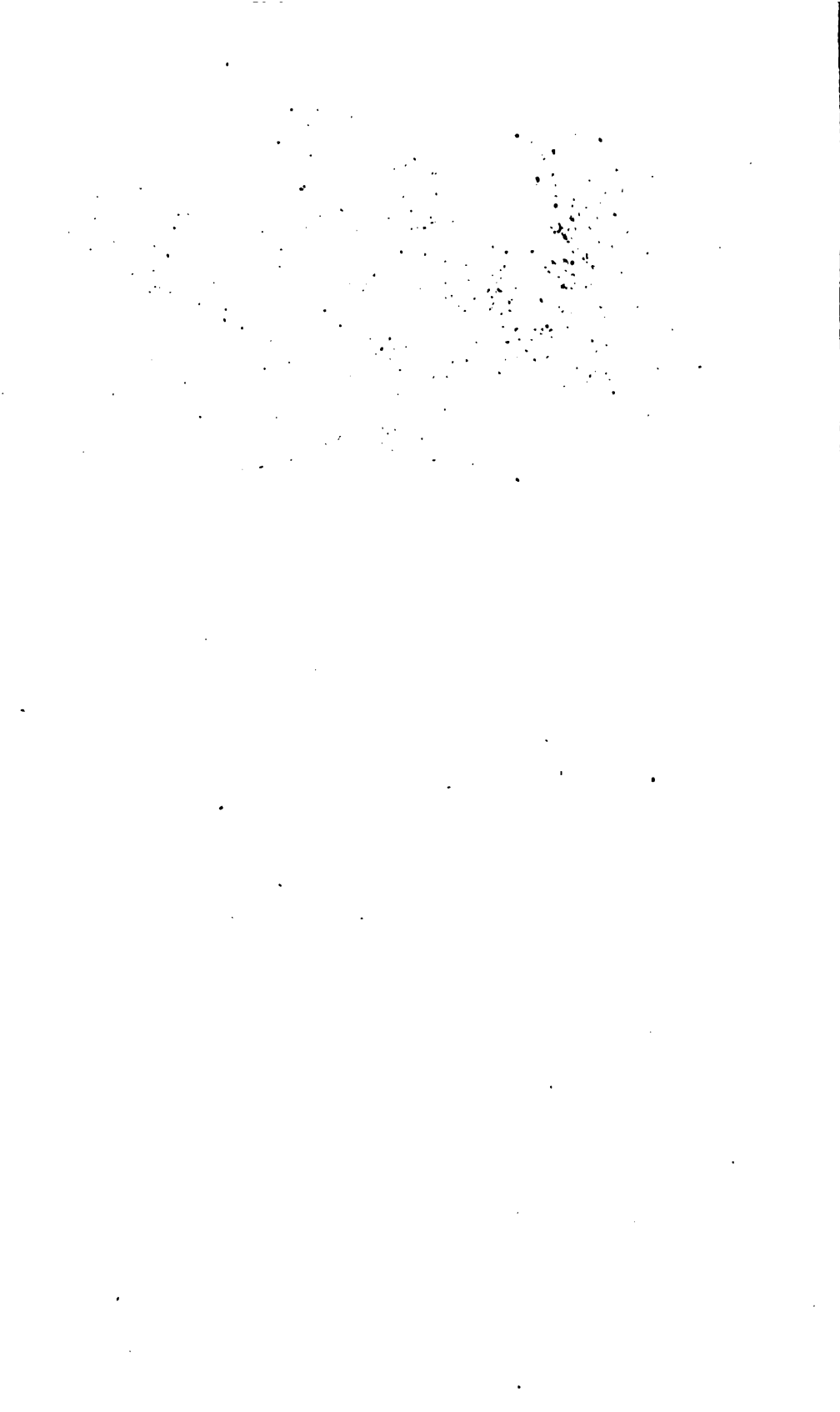
Certain unmanufactured tobacco had been imported in the year 1835, and warehoused in the London Docks. In March, 1836, it was, with the permission of the commissioners of the customs, shipped, under bond, for Ireland. In the course of the voyage the ship, having received damage, was abandoned and driven on shore, where she remained several days, when, the cargo having been landed, the vessel was got off, and, though considerably damaged, was afterwards repaired by parties to whom she was sold:—*Held*, that the tobacco was not "wreck" within the meaning of the statute. *Legge v. Boyd*. Page 92

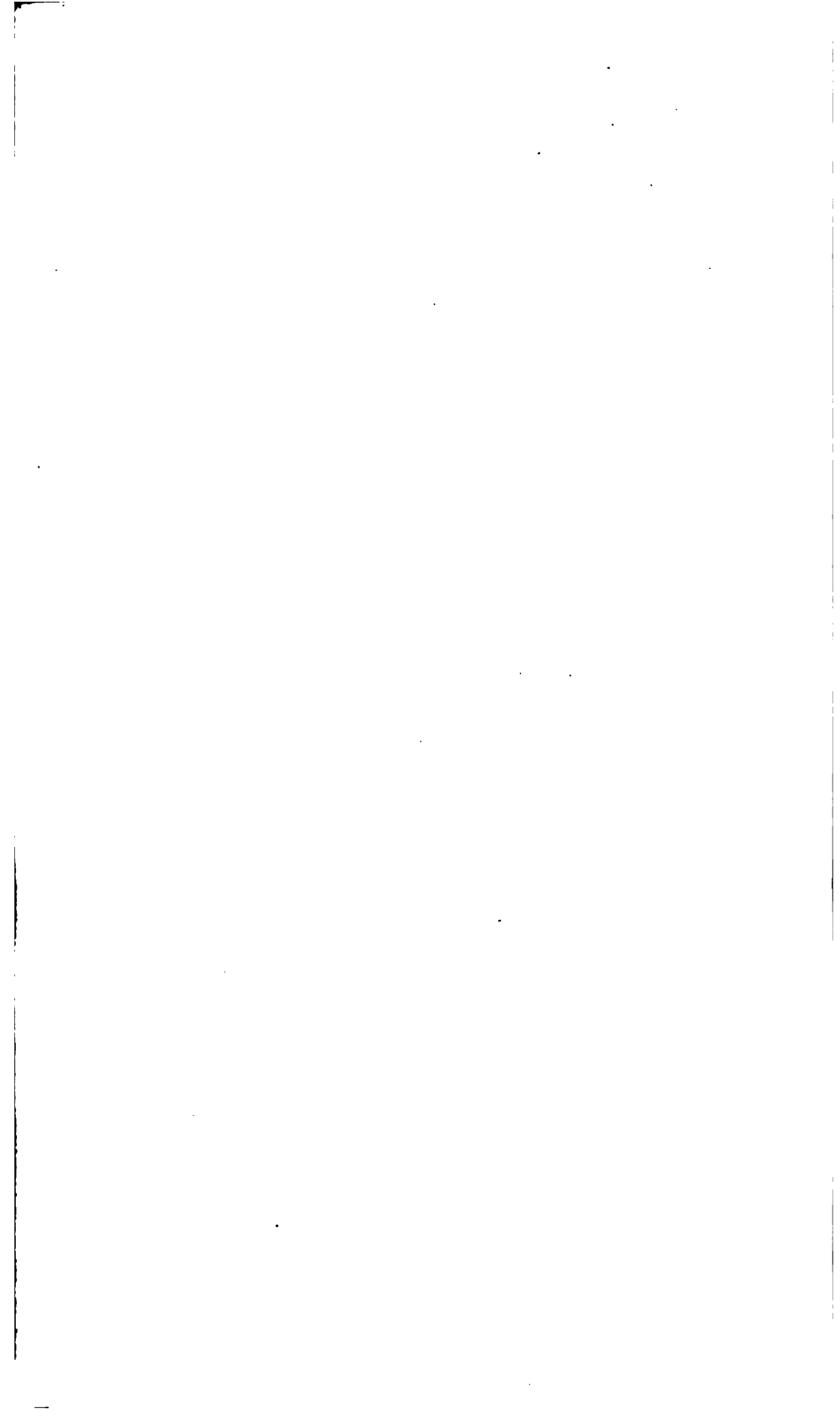
WRIT OF RIGHT.

Appearance of knights to choose recognitors.
Davies, Dem. ; Lowndes, Ten. 435

WRIT OF TRIAL.

Quare, whether it can be carried down by proviso. *Nicholson v. Jackson*. 622











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